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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

UNITED PARCEL SERVICE, INC. and
TEAMSTERS NATIONAL UNITED PARCEL SERVICE
NEGOTIATING COMMITTEE,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Joint Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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JOINT PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Can the National Labor Relations Board properly find that an employer has unlawfully recognized a union as its employees' collective bargaining representative where no evidence has been presented that the union lacked the support of a majority of the employees?

2. Is it permissible to apply a presumption that workers previously excluded from a bargaining unit do not support a union, when that presumption is not supported by either empirical evidence or policy considerations?

3. Can the National Labor Relations Board alter its well-established accretion doctrine to hold that employees who were historically not part of a bargaining unit can never be accreted to that unit, without giving any reasoned analysis for such a change?

PARTIES TO THE PROCEEDING AND DESIGNATION OF CORPORATE RELATIONSHIPS

In accordance with Rule 29.1 of the Rules of the Supreme Court of the United States the parties make the following disclosures:

Petitioner, United Parcel Service, Inc., is comprised of two entities, one incorporated in the state of New York and one incorporated in the state of Ohio, both of which are incorporated under the name "United Parcel Service, Inc." Neither corporation has an ownership in any other company that is not a wholly-owned subsidiary. The parent of both corporations is United Parcel Service of America, Inc.

Petitioner, Teamsters National United Parcel Service Negotiating Committee, is not a corporate entity and has no corporate parents, subsidiaries or affiliates.

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JOINT PETITION FOR A WRIT OF CERTIORARI

United Parcel Service, Inc. and the Teamsters National United Parcel Service Negotiating Committee jointly petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (1a-13a) is reported at 17 F.3d 1518 (D.C. Cir. 1994). The decision and order of the National Labor Relations Board (14a-

51a) are reported at 303 N.L.R.B. 326 (1991). The decision of the Administrative Law Judge (30a-51a) is appended to the decision of the National Labor Relations Board.

JURISDICTION

The judgment of the court of appeals (55a-56a) was entered on March 25, 1994 and a petition for rehearing was denied on July 20, 1994 (52a-54a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved in this case are Sections 8(a)(1)-(3) and Sections 8(b)(1)(A) and (b)(2) of the National Labor Relations Act, 29 U.S.C. §§ 158 (a)(1)-(3) and 158(b)(1)(A) and (b)(2). The full text of these provisions is set forth in the appendix (57a-58a) in accordance with Rule 14.1(f) of the Rules of the Supreme Court of the United States.

STATEMENT OF THE CASE

Prior to 1979, local unions affiliated with the International Brotherhood of Teamsters ("IBT") represented most, but not all, of the "operations clerks" employed by United Parcel Service, Inc. ("UPS") throughout the country. In 1979, UPS and the IBT agreed to consolidate many smaller bargaining units into a single nationwide bargaining unit. For the next eight years, the parties disagreed over whether the nationwide bargaining unit of over 100,000 persons included those operations clerks who, prior to 1979, had not been represented by the IBT.

In 1987, in the belief that the union enjoyed majority support among the employees in question, the parties agreed to modify the language in their collective bargaining agreement expressly to include *all* operations clerks. Of the 2,000 to 3,000 operations clerks added to the bargaining unit, one employee, Sara Griffin, complained to the National Labor Relations Board ("NLRB"

or "Board"). Although Ms. Griffin lived in a "right-to-work" state and, thus, was not required to join the union, she nevertheless filed an unfair labor practice charge, alleging unlawful recognition *i.e.*, violations of Sections 8(a)(1)-(3) and 8(b)(1)(A) and (b)(2) of the National Labor Relations Act ("NLRA").

The General Counsel subsequently issued a complaint against UPS and the IBT alleging that the union did not represent a majority of the employees who were added to the existing unit and, further, that those employees did not constitute a proper accretion to the unit. A full hearing on the charge was held before an Administrative Law Judge ("ALJ"). In accordance with the traditional analysis applied by the Board, the ALJ concluded that the operations clerks had been properly accreted to the existing bargaining unit because they shared a strong "community of interest" with the other IBT-represented employees (47a, 50a-51a).[1] Accordingly, the ALJ dismissed the complaint (51a).

On exceptions filed by the General Counsel to the ALJ's decision, the Board agreed that the employees added to the unit shared a community of interest with the other IBT-represented employees, but nevertheless held that they were not accreted to the unit (17a, 20a). The Board reasoned that accretion is never possible if the employees in question have historically been excluded from the bargaining unit (19a). Having rejected the ALJ's finding of accretion, the Board then concluded, with no discussion or explanation, that a majority of the employees added to the unit did not support the IBT (20a).

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[1] "Simply stated, an accretion is the incorporation of employees into an already existing larger unit when such a community of interest exists among the entire group that the additional employees have no separate unit identity." *NLRB v. Security-Columbian Banknote Co.*, 541 F.2d 135, 140 (3d Cir. 1976).

The Board's decision did not discuss the General Counsel's burden of proving that a majority of the employees did not support the union, nor did it discuss the undisputed fact that the General Counsel had failed to introduce any evidence that the IBT lacked majority support. Likewise, the Board's decision did not address the evidence offered by the union that it *did* have majority support, and it totally ignored the uncontradicted evidence that only one out of the 2,000 to 3,000 affected employees (Ms. Griffin) ever complained about being brought into the bargaining unit (59a-67a). Nevertheless, the Board concluded that UPS and the IBT had violated the NLRA by respectively recognizing and accepting recognition for a bargaining unit within which the Board asserted that a majority of employees did not support the union (20a).

The court of appeals found that the Board's "historical exclusion" rule—*i.e.*, that accretion is never possible if the employees in question have historically been excluded from the bargaining unit—was reasonable (4a-9a). The court then turned to the question of whether the union lacked majority support among the employees. Citing well-settled precedent, the court acknowledged that "in cases alleging unlawful 8(a)(2) recognition it is the burden of proof of the General Counsel to establish that the union accorded recognition was not the majority representative" (10a) by introducing evidence that is "more than conjecture" (*id.*).

Although, or perhaps because, the Board's decision never addressed the General Counsel's burden of proof, the court of appeals assumed that the Board had permissibly applied a presumption that "the majority of a group that has historically been excluded from a bargaining unit does not support the union that represents that unit" (12a-13a). Allowing the General Counsel this presumption, the court then shifted the burden to the union and the company to demonstrate that the union was in fact supported by a majority of the disputed clerks (12a).

The court reasoned that a presumption of non-majority status after employees have historically been excluded from a bargaining unit was analogous to the presumption of continued majority status after a union has been recognized or certified by the Board (11a-12a). The court did not require any empirical evidence that this presumption was reasonable nor did it acknowledge that the Board applies a "no presumption" rule in cases where support for the union by employees hired during a strike is at issue.

Thus, despite the fact that in cases alleging a violation of Section 8(a)(2), the General Counsel is required to produce evidence to support his claim that the union does not have majority status, the court concluded that, in the absence of affirmative evidence of majority support, the General Counsel was not required "to prove the negative" (13a). The court then granted enforcement of the Board's order which requires UPS to withdraw and withhold recognition from the IBT with respect to these employees pending certification (13a, 31a). Moreover, the order holds UPS and the IBT jointly liable to reimburse employees for union dues and initiation fees unlawfully withheld—an amount that could potentially exceed one million dollars (21a).

UPS and the IBT seek review of that decision, which conflicts with this Court's decisions regarding the appropriate use of presumptions, the procedure that an administrative agency must follow to change established rules, and which presents important questions of labor law.

REASONS FOR GRANTING THE PETITION

Review of the court of appeals' decision in this case is of exceptional importance because the decision sanctions the unprecedented and unwarranted result that the Board can find that the recognition of a union as the employees' bargaining agent is unlawful without ever adducing evidence, let alone proving, that the union did not represent a majority of the employees involved. Thus, the court of appeals' decision contravenes this Court's decision in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 401 (1983) which establishes that the General Counsel has the burden of proof in an alleged unlawful recognition case, and it frustrates two major goals of federal labor relations—the encouragement of collective bargaining and harmonious union-management relations.

Review in this case is also warranted because the court of appeals' decision irreconcilably conflicts with this Court's decisions regarding the permissible use of presumptions. In enforcing the Board's decision, the court of appeals *presumed*, without any empirical evidence or policy support, that historically excluded employees do not support the union. Thus, the court of appeals decision squarely conflicts with this Court's decisions in *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775 (1990) and *NLRB v. Baptist Hospital, Inc.*, 442 U.S. 773 (1979) which require that presumptions be supported on both empirical and policy grounds. Moreover, the presumption is irrational, irreconcilable with established Board law, and contrary to the policies underlying the NLRA.

Finally, review is warranted because the Board's decision, as enforced by the court of appeals, alters a long-standing doctrine or rule without providing a reasoned basis for that change as required by this Court's decision in *Motor Vehicle Manufacturers Association of the United States, Inc. v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 42 (1983). Specifically, the Board failed to supply any reasoned analysis when chang-

ing the accretion doctrine from a "community of interest" analysis to an analysis that treats historical exclusion as a determinative factor. For these reasons, further review of the court of appeals decision is warranted.

I. CERTIORARI SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS' DECISION ALLOWING A PRESUMPTION TO SUBSTITUTE FOR ADMISSIBLE EVIDENCE CONFLICTS WITH APPLICABLE PRECEDENT OF THIS COURT.

It is clearly established that the General Counsel carries the burden of proving the elements of an unfair labor practice charge. *See Transportation Management*, 462 U.S. at 401; 29 C.F.R. § 101.10(b) ("the Board's attorney has the burden of proof of violations of Section 8 of the [NLRA]"); 5 U.S.C. § 556(d) ("the proponent of a rule or order has the burden of the proof").

In the context of an alleged unlawful recognition, the Board has held, without exception, that the General Counsel's *prima facie* case requires proof of a lack of majority support. *See, e.g., Rainey Sec. Agency, Inc.*, 274 N.L.R.B. 269, 279 (1985); *see also, International Ladies' Garment Workers' Union v. NLRB*, 366 U.S. 731, 738 (1961) (stating that the gist of a Section 8(a)(2) violation is the "grant of exclusive recognition to a minority union"). This burden of proving lack of majority support remains with the General Counsel even if a rival union's certification petition is pending. *See e.g., Playskool, Inc. v. NLRB*, 477 F.2d 66, 71 (7th Cir. 1973); *Modine Mfg. Co. v. NLRB*, 453 F.2d 292, 296 (8th Cir. 1971); *William Penn Broadcasting Co.*, 93 N.L.R.B. 1104, 1106 (1951). Such proof requires evidence which is "more than conjecture." *American Beef Packers, Inc.*, 187 N.L.R.B. 996 (1971), *enf'd sub nom. Arthur L. Morgan Union, Local No. 3 v. NLRB*, 463 F.2d 818 (D.C. Cir. 1972).

Acknowledging the undisputed law establishing the General Counsel's burden of proof, and confronted with a case in which the General Counsel had adduced *no* evidence to satisfy this burden, the court of appeals *assumed* that the Board had applied a presumption that previously unrepresented employees do not support a union. The court of appeals stated:

> *[I]t is reasonable for the Board to presume that, absent some indication to the contrary, the majority of a group that has historically been excluded from a bargaining unit does not support the union that represents that unit.* Without any affirmative evidence that the union has obtained majority support—such as a response to a union organizational campaign—there is simply no basis upon which to believe that the union in fact enjoys majority support. *Having shown that there is no such basis in this case—and he can hardly do more to prove the negative—the General Counsel made his prima facie case; it was then up to UPS and the Teamsters to rebut him, and this they utterly failed to do.*

(13a) (emphasis added).

The presumption inferred by the court of appeals cannot meet the standards established by this Court for allowing presumptions to substitute for evidence. Moreover, the court of appeals' decision is at variance with every other reported decision, since it held an employer and union liable for the former's recognition of the latter, in the absence of any *evidence* that a majority of the affected employees did not support the union.

In *NLRB v. Baptist Hospital, Inc.*, 442 U.S. 773, 787 (1979), this Court reaffirmed that "a presumption adopted and applied by the Board must rest on a sound factual connection between the proved and inferred facts" and that the validity of any presumption depends upon the rationality betwen what is proved and what is inferred. These requirements are rooted in a long line of this

Court's precedent concerning the application of presumptions by the Board. *See Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 504 (1978); *NLRB v. Burns Int'l Sec. Servs. Inc.*, 406 U.S. 272, 279 n.3 (1972); *Brooks v. NLRB*, 348 U.S. 96, 98-99 (1954); and *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 804-05 (1945). In this case, neither the Board nor the court of appeals offered any basis to demonstrate the required sound factual connection between what was proved—*i.e.*, a group of previously unrepresented employees—and what was inferred—*i.e.*, that such employees do not support the union.

The court of appeals' decision is also inconsistent with this Court's holding in *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775 (1990). In *Curtin Matheson*, an employer argued that persons who crossed picket lines to replace striking workers should be presumed not to support the union. 494 U.S. at 778. This Court rejected the employer's position and upheld the Board's application of a "no-presumption" rule in such cases. *Id.* at 796. In so ruling, this Court stated that, to be valid, a presumption must be both empirically supported, and consistent with the policies of the NLRA. *Id.* at 787. This Court concluded that the Board's no-presumption rule passed muster under both prongs of this test. *Id.* at 796.

The presumption in this case has neither the sound factual connection required by *Baptist Hospital*, nor the empirical and policy support required by *Curtin Matheson*. Tested against this Court's precedent, the court of appeals' presumption in the instant dispute that historically excluded employees do not support the union must fail as irrational and inconsistent with the policies of the NLRA.

First, the presumption that historically excluded employees do not support the union is irreconcilable with established Board law. Such a presumption cannot be

reconciled with the Board's no-presumption policy in the case of striker replacements which was endorsed by this Court in *Curtin Matheson.* If persons who cross picket lines to fill the jobs vacated by striking employees cannot permissibly be presumed to oppose the union, neither can those who were merely historically excluded from the bargaining unit. If the sentiments of striker replacements for or against the union should be assessed on the basis of the evidence and not presumptions, so should the views of previously unrepresented employees.

Second, application of the court of appeals' presumption would eviscerate the well-established body of Board and court decisions that an employer need not possess tangible proof of a union's majority status in order lawfully to recognize the union as the exclusive bargaining agent of the employer and employees. *See Regency Gardens Co.,* 263 N.L.R.B. 1265 (1982) (noting that "there is no requirement that a union must have, and show to an employer, a majority of signed cards before a union may be lawfully recognized by an employer"); *Walker's Midstream Fuel & Serv., Co.,* 208 N.L.R.B. 158 (1974) (dismissing complaint even though, as here, the union did not attempt to claim majority status by producing recognition cards). Application of the presumption of the court of appeals would mean that any time a union seeks to represent previously unrepresented employees, the General Counsel's burden to prove such recognition unlawful would automatically be discharged by virtue of their previous unrepresented status. Such a result is contrary to all applicable precedents, statutes and regulations.

Finally, the application of this presumption does not make common sense. Presumptions are used as an evidentiary tool when "proof of one fact renders the existence of another fact so probable that it is sensible and timesaving to assume the truth of [the inferred] fact . . . until the adversary disproves it." *Curtin Matheson,* 494 U.S. at 788 (citing E. Cleary, *McCormick on Evidence* § 343,

at 969 (3d ed. 1984)). As in the situation involving striker replacements, there are many reasons, apart from anti-union sentiment, that workers may be excluded from a bargaining unit when it is first recognized or certified. Moreover, even if the excluded workers were generally opposed to the union when it initially became the bargaining representative, it stands to reason that these views may change if union representation proves beneficial to their co-workers.

As applied in this instant case, application of the presumption was especially illogical. The ALJ expressly found (50a) that, of the 2,000 to 3,000 affected employees, only one (Ms. Griffin) objected to being brought into the bargaining unit, and the IBT presented evidence (which the court of appeals acknowledged, but characterized as "impressionistic" (11a)) that it *did* have majority support (10a-11a). The General Counsel adduced not an iota of contrary evidence. Given these facts, it is far more rational to presume that the union did have majority support than to presume the contrary.

Consequently, the court of appeals' adoption of a presumption of lack of majority support is both inconsistent with standards approved by this Court for assessing the validity of presumptions and is completely irrational.

II. CERTIORARI SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS' DECISION ABSOLVING THE GENERAL COUNSEL OF HIS BURDEN TO PROVE A LACK OF MAJORITY STATUS IN AN UNLAWFUL RECOGNITION CASE IS CONTRARY TO EVERY REPORTED PRECEDENT ON THIS ISSUE.

As discussed earlier, established precedent unequivocally holds that the General Counsel has the burden, in unlawful recognition cases, to prove that the union lacked majority support at the time of recognition. *See supra*, at 7.

The court of appeals recognized this principle (9a-10a) and purported to follow it, but in fact deviated sharply from it by ruling that the employer's and union's assertion of the defense of accretion required that a different rule be followed (11a). In so holding, the court of appeals deviated from every other reported decision on the issue of accretion.

The cases are uniform in holding that accretion is an affirmative defense available to the employer and union even if the union lacks majority suport. *See, e.g., Laconia Shoe Co.*, 215 N.L.R.B. 573, 575 (1974) (stating that, if the defense of accretion is established, "the extension of recognition to the [union] was lawful whether or not the Shoeworkers enjoyed majority support among those employees"); *King Radio Corp.*, 257 N.L.R.B. 521, 525 (1981) (recognizing that "accretion would constitute an absolute defense to the 8(a)(1) and (2) allegations" regardless of lack of majority).

Thus, the threshold issue—even before considering the defense of accretion—was whether the General Counsel had established a *prima facie* violation of Section 8(a)(2), by proving that the IBT lacked majority support of the newly-included employees. On that threshold issue of majority support, it is well-established that the burden of proof rests with the General Counsel to show the *absence* of such support. *See, e.g., Progressive Construction Corp.*, 218 N.L.R.B. 1368, 1371 (1975):

> It was incumbent on General Counsel to adduce direct and affirmative evidence—such as proof that a majority of the unit employees did not sign authorization cards or that they otherwise manifested unwillingness to be represented by Carpenters on the critical dates in issue.

Similarly, in *American Beef Packers, Inc.*, 187 N.L.R.B. 996, 997 (1971), *aff'd sub nom. Arthur L. Morgan Union, Local No. 3 v. NLRB*, 463 F.2d 818 (D.C. Cir. 1972), the Board dismissed a Section 8(a)(2) complaint, stating:

> The circumstantial evidence relied on by the Trial Examiner in drawing an inference of lack of majority amounts to nothing more than conjecture. It is no substitute for proof, *which is the General Counsel's burden,* that Amalgamated [the recognized union] did not in fact represent a majority of Respondent's employees at the relevant times. Accordingly, we shall dismiss the complaint in its entirety.

Consequently, by holding that the burden of proof on majority status should shift from the General Counsel to the employer and the union merely because the latter entities asserted the defense of accretion, the court of appeals ignored a uniform line of precedent holding that (1) it is the General Counsel's burden in an unlawful recognition case to prove lack of majority support, and (2) accretion can be a valid defense even if majority support was lacking.

The court of appeals' decision in this case is also inconsistent with this Court's recent decision in *Director, Office of Workers' Compensation Programs, Department of Labor v. Greenwich Collieries,* 114 S. Ct. 2251 (1994). *Greenwich Collieries* holds that the phrase "burden of proof" as used in Section 7(c) of the Administrative Procedures Act, 5 U.S.C. § 556(d), means burden of persuasion. 114 S. Ct. at 2257.

The court of appeals attempted to justify its shifting the burden to UPS and the IBT by drawing an analogy to the burden of proof in cases where an employer is charged with illegally withdrawing recognition from a union (11a-12a). As the court noted (12a), the burden of proof in such cases is initially on the employer to demonstrate that it had a "good faith reasonable doubt" as to the union's majority status before withdrawing recognition; only if it meets that burden is the General Counsel obligated to produce evidence that the union in fact *did* enjoy majority support at the time recognition was withdrawn.

The court of appeals' analogy provides no basis for shifting the burden of proof to the employer and union. The burden of proof in cases alleging unlawful withdrawal of recognition (the court's analogy) has no relevance to the burden of proof in cases alleging unlawful recognition of a minority union (the present case). Thus, not only is the court of appeals' analogy illogical and inconsistent with basic labor law principles,[2] but it provides no basis for distinguishing the uniform line of cases holding that (1) the burden is on the General Counsel to prove lack of majority support, and (2) accretion is a defense even if majority support was lacking. Petitioners request this Court to grant certification in order to rectify the court of appeals' unprecedented deviation from these well-established principles.

III. CERTIORARI SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS' DECISION FRUSTRATES THE IMPORTANT GOAL OF ENCOURAGING COLLECTIVE BARGAINING.

In addition to being inconsistent with this Court's rulings on presumptions and with all reported decisions on

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[2] It is hard to imagine an action that is more clearly a direct interference with collective bargaining than an employer's withdrawal of union recognition. By definition, an employer that withdraws recognition is disrupting an established bargaining relationship, and the employer's action is directly antithetical to collective bargaining. Because one of the express goals of the NLRB is to "encourag[e] the practice and procedure of collective bargaining" (29 U.S.C. § 151, fifth paragraph), it is not surprising that the Board and the courts place the initial burden of proof on an employer to justify its disruption of this bargaining relationship.

In the present case, by contrast, UPS and the IBT were not antagonists, but were in agreement. Indeed, the record clearly established that the parties' conduct in bringing the previously-excluded clerks into the unit—which UPS did only in response to repeated pressure from the IBT—*resolved* a long-festering dispute between the parties. Thus, the parties' conduct here encouraged collective bargaining, rather than frustrated it as any withdrawal of recognition would do.

the burden of proof in recognition cases, the court of appeals' decision is inconsistent with the NLRA's "overriding policy of achieving industrial peace." *Curtin Matheson*, 494 U.S. at 794 (quoting *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 38 (1987)). An expressed goal of the NLRA is to "encourag[e] the practice and procedure of collective bargaining." 29 U.S.C. § 151, fifth paragraph. Voluntary recognition fully credits that goal by achieving a collective-bargaining relationship through the agreement of the employer and the union. The court of appeals' decision frustrates the purposes of the NLRA by discouraging voluntary collective bargaining.

While it is true that the NLRA seeks to preserve the free choice of employees as well as to encourage collective bargaining, preservation of employee choice should be based on evidence, not presumptions. Had the General Counsel proved by competent evidence that a majority of the previously unrepresented employees did not support the union, one ordinarily could not quarrel with a finding that the freedom of employee choice should prevail over the goal of furthering collective bargaining (unless, of course, the elements of a valid accretion defense were present). However, where (as here) there was *no* evidence that the union lacked majority support, application of a presumption based solely on historical exclusion violated the goal of encouraging collective bargaining while doing nothing to preserve free choice of employees.

In this case UPS voluntarily recognized the IBT as the exclusive representative of 2,000 to 3,000 previously unrepresented clerks. These clerks received the full benefit of the UPS/IBT negotiated collective bargaining agreements. Not one of these clerks complained about the recognition or the attendant benefits, save a single voice from an individual who, because she resides in a "right-to-work" state, was not compelled to join the union. On the basis of a single dissent from a group of between

2,000 to 3,000 employees and the court of appeals' irrational presumption, a stable collective bargaining relationship stands to be upset.

The court of appeals' presumption and burden-shifting approach inject an aura of uncertainty into the otherwise settled law on voluntary recognition. Such uncertainty has broad-based ramifications and is contrary to the NLRA's goals of stabilization and industrial peace. This Court should grant this writ of certiorari and maintain the stability that the court of appeals' decision threatens to disrupt.

IV. CERTIORARI SHOULD BE GRANTED BECAUSE THE BOARD HAS ALTERED THE ACCRETION DOCTRINE IN A MANNER THAT CONFLICTS WITH THE DECISIONS OF THIS COURT.

Administrative agencies may not alter established doctrines unless they "supply a reasoned analysis for the change." *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983); *accord Rust v. Sullivan*, 500 U.S. 173, 187 (1991). In this case, the Board not only failed to supply a reasoned analysis for changing the accretion doctrine, it also refused to admit that it was making a change. For this reason alone, the court of appeals erred in granting the petition to enforce the Board's order.

Prior to this case, the Board applied a multi-factored analysis in virtually every decision involving the accretion doctrine. *See, e.g., St. Regis Paper Co.*, 239 N.L.R.B. 688, 691-92 (1978); *Great Atl. & Pac. Tea Co.*, 140 N.L.R.B. 1011, 1021 (1963). The Board found an accretion if factors indicated that the employees shared a community of interest. As explained in *St. Regis*:

> Whether or not a particular operation constitutes an accretion or a separate unit turns, of course, on the entire congeries of facts in each case. . . . [T]he Board has given weight to a variety of factors, such

> as integration of the operations; centralization of managerial and administrative control; geographic proximity; similarity of working conditions, skills, and functions; common control over labor relations; collective-bargaining history; and interchangeability of employees. Obviously, cases in which all of these, or only these, positive accretion factors are present are rare. For, the normal situation presents a variety of elements, some militating toward and some against accretion, so that a balancing of factors is necessary.

239 N.L.R.B. at 691.

Contrary to its own established precedent, the Board now argues that the historical exclusion factor—*i.e.*, whether the employees have historically been a part of the bargaining unit—is alone determinative. In attempting to justify the Board's historical exclusion rule, the court of appeals' decision twice quotes from the ALJ's decision in *Laconia Shoe Co.*, 215 N.L.R.B. 573 (1974). However, in *Laconia Shoe*, the Board expressly found that the General Counsel had met his burden of proving a lack of majority status. 215 N.L.R.B. at 573 n.1. Therefore, the so-called historical exclusion rule was irrelevant and the language quoted by the court of appeals is merely dicta.

Moreover, in *United States Steel Corp.*, 280 N.L.R.B. 837, 837 n.2 (1986), a case decided eight years after *Laconia Shoe*, the Board expressly rejected this so-called historical exclusion rule, stating:

> While we agree with the judge's finding that the Respondent's truckdrivers at the Antioch facility do not constitute an accretion to the existing bargaining unit of warehouse employees, *we do not adopt the judge's analysis that the "controlling factor" here is the long bargaining history of separate units* of warehouse employees and truckdrivers. *Rather*, we find, *after examining all of the accretion factors traditionally considered by the Board*, that the two employee groups continued to maintain their

> separate identities despite certain changes made in the drivers' duties.

(emphasis added).

Thus, *United States Steel* reaffirmed that historical exclusion is not the determinative factor in a proper accretion analysis. The Board was not entitled to change its rule on accretion to make the historical exclusion factor determinative unless it provided a reasoned analysis to support that change. It did not, and it could not, because such a change is irrational and contrary to the policies underlying the NLRA.

CONCLUSION

For the foregoing reasons, petitioners, United Parcel Service, Inc. and the Teamsters National United Parcel Service Negotiating Committee respectfully request that this Court grant their petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

Nos. 91-1314, 91-1317

TEAMSTERS NATIONAL UNITED PARCEL SERVICE NEGOTIATING COMMITTEE and INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL 385, AFL-CIO,
Petitioners/Cross-Respondents,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent/Cross-Petitioner.

UNITED PARCEL SERVICE, INC.,
Petitioner/Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent/Cross-Petitioner.

Petitions for Review and Cross-Petitions for Enforcement of an Order of the National Labor Relations Board

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Argued Sept. 8, 1993

Decided March 25, 1994

Before BUCKLEY, GINSBURG, and HENDERSON, Circuit Judges.

Opinion for the Court filed by Circuit Judge GINSBURG.

GINSBURG, Circuit Judge:

The Teamsters National United Parcel Service Negotiating Committee and United Parcel Service, Inc. separately petition for review, and the National Labor Relations Board applies for enforcement, of a Board order (1) requiring the Company to withdraw recognition of the Union as the representative of certain operations clerks; and (2) requiring the Company and the Union to reimburse those clerks for dues payments that had been deducted from their paychecks during the period that the Company recognized the Union as their representative. Because the order is supported by substantial evidence and is consistent with prior Board precedent concerning accretions to a bargaining unit, we deny the petitions for review and grant the Board's petition to enforce the order.

I. Background

Prior to 1979, operations clerks at various UPS facilities were separately represented by approximately 220 different local unions, all of which were affiliated with the International Brotherhood of Teamsters. At that time, about 40% of UPS's operations clerks were not covered by a contract between UPS and a local union. In 1979, however, the Company recognized the Teamsters as the representative of all operations clerks in a new nationwide bargaining unit; and all of the local unions were merged into the national unit.

Under their new nationwide collective bargaining agreement, the Company and the Union agreed that "[e]mployees covered by this agreement shall be construed to mean, where already recognized . . . clerks. . . ." Following execution of the contract, the Union contended

that this provision meant that all clerks employed by the Company were covered by the agreement; the Company countered that only those clerks previously represented by one of the Teamster locals were covered by the agreement.

In practice, the Board found only those clerks that had previously been represented by one of the local unions were treated by the parties as represented by the Teamsters under the nationwide agreement; the other clerks were excluded from the bargaining unit. Therefore, when the parties renegotiated the agreement in 1982, the Union proposed to delete the limiting phrase ("where already recognized") from the coverage provision quoted above and the Company insisted upon retaining it. When the Union again argued in 1987 that it should be treated as the representative of all the clerks, the Company finally agreed: "effective August 1, 1987, the Employer recognize[d] [all clerks] as bargaining unit members." The new agreement also contained a union security clause that required all employees to pay dues and initiation fees as a condition of employment (where state law permitted). The Company therefore began to deduct Union dues and initiation fees from previously unrepresented clerks who completed a dues checkoff form.

Upon a charge filed by an operations clerk from whom Union dues were newly deducted in 1987, the General Counsel charged the Company and the Union with various unfair labor practices in violation of §§ 8(a)(1)-(3) and 8(b)(1)(A) and (2) of the Labor Management Relations Act. An Administrative Law Judge found that the previously unrepresented clerks had been properly accreted to the existing bargaining unit, and therefore held that there was no unfair labor practice in agreeing that the Company would recognize the Union as the bargaining representative for all operations clerks. *United Parcel Services, Inc.*, 303 N.L.R.B. 326, 330-36 (1991) (ALJ Opinion). The Board, however, rejecting the

ALJ's opinion, held that the Company and the Union had violated the Act by respectively recognizing and accepting recognition for a bargaining unit within which a majority of employees had not picked the Union as their representative. *See id.* at 326-30 (Board Order); *see also International Ladies Garment Workers' Union v. NLRB (Bernhard-Altmann Texas Corp.)*, 366 U.S. 731, 738-39, 81 S.Ct. 1603, 1608, 6 L.Ed.2d 762 (1961) (holding that "employer support of a minority union" and the minority union's acceptance of such recognition are unfair labor practices); *Human Development Ass'n v. NLRB*, 937 F.2d 657, 665 (D.C.Cir. 1991) (same). The Board ordered the Company to withdraw recognition from the Union with respect to the previously unrepresented clerks until such time as the Board might certify the Union as their exclusive representative, and ordered the Company and the Union to reimburse the clerks for the dues and initiation fees that were unlawfully collected from them.

II. Analysis

The petitioners attack the Board's order on two fronts. First, they argue that precedent requires the Board to apply its "community of interest" standard for evaluating an accretion to a bargaining unit, under which (they claim) the accretion of the clerks would have passed muster. In the alternative they contend that the Union had majority status among the accreted clerks and was therefore lawfully recognized by the Company.

A. *Were the Clerks Lawfully Accreted?*

An accretion occurs whenever new employees are added to an existing bargaining unit. In contested cases the Board generally applies a community of interest test for determining the legality of an accretion. That test involves an examination and balancing of such factors as "integration of operations, centralization of managerial and administrative control, geographic proximity, similarity of working conditions, skills and functions, common

control of labor relations, collective-bargaining history, and interchange of employees." *Gould, Inc.*, 268 N.L.R.B. 442, 445 (1982).

In this case, however, the Board declined to apply the community of interest test, holding that "the fact of [the clerks'] historical exclusion [from the bargaining unit] . . . is determinative" that they could not be accreted to the unit except by a showing of majority sentiment among them. 303 N.L.R.B. at 327 (emphasis omitted). In other words, if neither the Company nor the Union insisted upon including a particular group of employees in a bargaining unit at its formation, then the excluded employees are thereafter conclusively presumed to lack a community of interest with those in the bargaining unit. Both the Company and the Union attack the Board's holding as contrary to Board precedent and therefore arbitrary and capricious. *See International Union of Petroleum & Industrial Workers v. NLRB*, 980 F.2d 774, 778 (D.C. Cir.1992).

The Board based its holding in this case on its prior decision in *Laconia Shoe*, 215 N.L.R.B. 573 (1974), in which it stated:

> When a group has in fact been excluded for a significant period of time from an existing production and maintenance unit, the Board will not permit their accretion without an election or a showing of majority among them even if no other union could obtain representative status for them.

Id. at 576. That decision fully supports the Board's formulation in this case—that the clerks' "historical exclusion . . . is determinative" against their later accretion absent evidence of the majority's preference.

The Union, however, argues both that *Laconia Shoe* was wrongly decided—specifically, that the case upon which the Board based that decision, *Sterilon Corp.*, 147 N.L.R.B. 219 (1964), does not support the conclusion

reached in *Laconia Shoe*—and that the Board has not consistently applied it to cases like the present one. As to the former point, we do not think it necessary, in view of the intervening case law, to re-examine the fundaments of *Laconia Shoe*. Both the Board and the courts recognize that the *Laconia Shoe* doctrine is critical to the protection of employees' Section 7 right to choose whether to belong to a union and if so to which one. As the Second Circuit perceptively stated the matter in *NLRB v. Stevens Ford, Inc.*, 773 F.2d 468 (1985):

> If groups of employees may be permissibly accreted to a bargaining unit after they have been earlier excluded from an election in that unit, strategic selection of one group for election purposes followed by accretion will lead to a larger bargaining unit in which the bargaining representative does not have majority status. Such boot-strapping violates the Act's policies favoring the free choice of employees.

Id. at 474; *see also King Radio Corp.*, 257 N.L.R.B. 521, 526 (1981) (no accretion of group excluded when bargaining unit was formed regardless of commonality of interests).

The petitioners' argument that the Board has not applied *Laconia Shoe* consistently rests primarily upon its decision in *St. Regis Paper*, 239 N.L.R.B. 688 (1978), *aff'd*, 255 N.L.R.B. 72 (1981), *enf'd*, 674 F.2d 104 (1st Cir.1982). The employer in that case had entered into a collective bargaining agreement that was expressly limited to the mechanics at its garage in Bucksport, Maine. When the company later opened an additional garage at First Lake and staffed it by transferring union members from the Bucksport facility, it recognized that the transferred mechanics continued to be represented by the Union, but it refused to renegotiate the provision of the collective bargaining agreement limiting its coverage to the Bucksport garage. Eventually, the employer hired new non-union mechanics for the First Lake garage and transferred the union members back to Bucksport.

The Board found that the new mechanics at the First Lake facility had lawfully been accreted to the Bucksport bargaining unit, in part because the First Lake mechanics "had been governed by the contract between [the employer] and the union [even though] the contract purported to cover Bucksport only." To our reading, this suggests that the accretion occurred when the new garage was opened, and that no employees were ever "historically excluded" from the bargaining unit. *St. Regis Paper* does not, therefore, demonstrate that the Board has failed to apply the *Laconia Shoe* rule consistently.

Nor does *Lammert Industries v. NLRB*, 578 F.2d 1223 (7th Cir.1978), which involved the physical consolidation of one union facility with 19 employees, and one non-union facility with seven employees, into a new facility. In *Lammert*, the Board ultimately found that the union retained its majority status at the new facility and therefore permitted it to represent all 26 employees. Although the combination of the previously unrepresented employees with the existing bargaining unit was (rather loosely in our view) termed an accretion, *Lammert* is uniquely addressed to the physical consolidation of a union and a non-union facility at a single location; it has no application to the accretion of employees who had historically been excluded from a bargaining unit. Therefore, the petitioners have failed to document their claim that the Board has not applied *Laconia Shoe* consistently since it was decided.

Finally, the petitioners argue that if the Board is to apply the rule of *Laconia Shoe*, then precedent and the facts of this case require it (1) to find that the Union did not acquiesce in the exclusion of any clerks from the bargaining unit and (2) then to weigh the Union's non-acquiescence heavily in its analysis of whether a lawful accretion occurred. According to UPS, for example, "*Laconia Shoe* makes clear that the question of union acquiescence remains essential to an accretion analysis." UPS Br. at 19. In sharp contrast, the Board maintains

that it is irrelevant whether the Union acquiesced in the clerks' exclusion, and that in any event the Board properly found that the Union had acquiesced in their exclusion when it accepted a contract that did not include them in the national bargaining unit.

In deciding this case, the Board clearly treated acquiescence as irrelevant to the exclusion issue. *See* 303 N.L.R.B. at 327. Nor does any of the accretion decisions that the petitioners cite demonstrate that the Board has previously deemed acquiescence a pre-requisite to finding that the historical exclusion of certain employees barred their accretion to an existing bargaining unit. *Sunar-Hauserman*, 273 N.L.R.B. 1176 (1984), a case upon which the petitioners rely heavily, arose from a unit clarification petition; it is simply inapplicable in the accretion context. Even if *SunarHauserman* were applicable, moreover, it would not sustain the petitioners' position. In that case, the Board found that "[t]he Union did not abandon its proposal to include [in the unit the new position of] dock auditor in exchange for a concession during bargaining" but rather expressly preserved its right to seek a bargaining unit clarification. *Id.* at 1177. In contrast, here the Teamsters twice agreed to the "where already recognized" limitation on the bargaining unit and never reserved the right to seek, much less sought, a bargaining unit clarification. Indeed, the Union claims only that it proposed to eliminate the exclusionary clause in later contract negotiations and in the interim pressed the Company on the matter.

Similarly, the petitioners assert that in *Color Tech Corp.*, 286 N.L.R.B. 476 (1987), the Board based its no-accretion holding crucially upon the union's not having initially sought to cover the disputed employees in its collective bargaining agreement. The Board did indeed note that the union had never sought to include the allegedly accreted employees in the bargaining unit, but it recounted that merely as evidence of their historical exclusion from the unit. *See id.* at 487. Nowhere in

that case did the Board indicate that union acquiescence *vel non* in the employees' exclusion is a factor to be considered in determining whether the historical exclusion of a group of employees precludes their later accretion.

The only decision that even remotely supports the petitioners' position is *King Radio Corp.*, 257 N.L.R.B. 521 (1981), in which the Board mentioned that the union had in the past "consciously excluded" the employees that it was then seeking to include by accretion in the bargaining unit. *See id.* at 526. In context, however, it is clear that the Board treated that fact as nothing more than additional evidence of the employees' historical exclusion.

In sum, the cases cited by the petitioners suggest only that the Board considers a union's course of conduct as a factor in determining whether a group of employees was in fact historically excluded from a bargaining unit. To infer from this, however, that the union's acquiescence is a prerequisite to the Board's finding that a group of employees was historically excluded would be significantly to overread the cases.

Never having held, in terms or de facto, that the union's acquiescence is a prerequisite to finding that employees were historically excluded from a bargaining unit, the Board was not obliged to determine whether the Union in this case acquiesced (as matter of law) in the exclusion of certain clerks from the nationwide UPS bargaining unit, or if it did not, whether its nonacquiescence means that the employees were not (again, as a matter of law) historically excluded from the unit. Therefore, the previously unrepresented clerks could not be incorporated into that unit absent a showing of majority support among them for the union.

B. *Did the Union Have Majority Support?*

The petitioners argue next that the Board's order should be set aside because the General Counsel failed to show that the Union lacked majority support among

the allegedly accreted clerks. If the Union had such majority support, then the Company was of course entitled to recognize it as their exclusive bargaining representative.

The law is clear that "in cases alleging unlawful 8(a)(2) recognition, it is the burden of proof of the General Counsel to establish that the union accorded recognition was not the majority representative." *Rainey Security Agency, Inc.*, 274 N.L.R.B. 269, 279 (1985) (internal quotations and citations omitted). It is equally clear that in meeting his burden of proof, the General Counsel must rely upon "more than conjecture," i.e., must produce evidence that the Union did not enjoy majority support. *American Beef Packers*, 187 N.L.R.B. 996, 997 (1971), *enf'd*, 463 F.2d 818 (D.C.Cir.1972); *see also Regency Gardens Co.*, 263 N.L.R.B. 1265, 1269 (1982).

The record in this case is also clear. To quote the Board, it was

> undisputed that the Employer did not ask for and the Union did not proffer proof of majority support for the Union in the group of previously unrepresented employees. An official of the Union testified about his belief that the Union had majority support in this group, but he admitted that he had no 'papers,' including authorization cards, to support this belief.

303 N.L.R.B. at 326. Further, we note that prior to prosecuting the complaint in this case, the General Counsel subpoenaed "all books, papers, documents, correspondence, notes or other writings showing that on or before August 1, 1987, a majority of operations clerks employed by UPS who had not been represented by the Teamsters prior to August 1, 1987 designated the Teamsters as their collective bargaining representatives." Hearing Trans. at 55. The Union produced nothing in response. At the hearing before the ALJ, a Union official

confirmed that he had "no records or papers to verify that." *Id.* Instead, he testified that he believed that the Union had majority status solely upon the basis of conversations he had had with various of the previously unrepresented clerks. *See id.* at 53.

The petitioners' argument raises the question whether the Board could properly find that the General Counsel discharged his burden of proof by showing that the Union's claim to majority support was entirely impressionistic and unsupported either by documentation or by any other indicia of employee sentiment. In another context we might well doubt whether the General Counsel's reliance upon these facts amounts to anything "more than conjecture." There is, after all, no general requirement that a union have documentary or indeed any specific type of evidence, such as authorization cards, to support its claim to majority support.

The General Counsel's burden should be sensitively calibrated, however, to the context in which it must be carried—in this case, a context formed by the doctrines of accretion and historical exclusion. We repeat the passage from the Board's opinion in *Laconia Shoe*, quoted above: "When a group has in fact been excluded for a significant period of time from an existing production and maintenance unit, the Board will not permit their accretion without an election or a showing of majority among them even if no other union could obtain representative status for them." 215 N.L.R.B. at 576. With this statement of the substantive law in mind, we do not see how the General Counsel could be expected to prove more, in his prima facie case against accretion, than the fact that the employees in question were historically excluded from the putative bargaining unit. It was, of course, open to the Union to rebut the General Counsel's prima facie case by producing some reliable evidence of its majority status, but it failed to do so.

We see a close analogy between the manner in which the Board allocated the burden of proof in this case and the way in which the Board proceeds when an employer

has withdrawn its recognition of a union that it had recognized either voluntarily or after certification by the Board. Such a union benefits from the presumption of continued majority status. *See, e.g., Sullivan Industries v. NLRB*, 957 F.2d 890, 897 (D.C.Cir. 1992). Hence, if the employer ceases to recognize and to bargain with the union, it commits an unfair labor practice unless it can demonstrate, based upon clear and cogent evidence, that it had a "good faith reasonable doubt" as to the union's majority status. *See, e.g., Sullivan Industries*, 957 F.2d at 897-98; *NLRB v. Creative Food Design Ltd.*, 852 F.2d 1295, 1300-01 (D.C.Cir. 1988). If the employer succeeds in making this showing, the burden then shifts to the General Counsel to produce evidence that the union did, in fact, enjoy majority support when the employer withdrew its recognition from the union. *See Creative Food Design*, 852 F.2d at 1300.

Although the roles are reversed here, the situation is essentially similar. By showing that the disputed clerks had historically been excluded from the Teamsters Union, the General Counsel cast substantial doubt upon the Union's majority status among them. This doubt, which is founded upon fact and is thus "more than conjecture," is enough in the context of an alleged accretion, to satisfy the General Counsel's burden. The burden then shifted to the Union and the Company to demonstrate that the Union was, in fact, supported by a majority of the disputed clerks when the Company recognized it as their representative.

In light of the Board's explanation of the policies that underlie the accretion doctrine, this manner of proceeding makes eminently good sense. If a union and an employer could accrete unrepresented employees to an existing unit merely by claiming to be under the impression that the union has majority support among them, then the accretion doctrine would do little to protect the employees' right not to be represented by that union. In other words,

it is reasonable for the Board to presume that, absent some indication to the contrary, the majority of a group that has historically been excluded from a bargaining unit does not support the union that represents that unit. Without any affirmative evidence that the union has obtained majority support—such as a response to a union organizational campaign—there is simply no basis upon which to believe that the union in fact enjoys majority support. Having shown that there is no such basis in this case—and he can hardly do more to prove the negative—the General Counsel made his prima facie case; it was then up to UPS and the Teamsters to rebut him, and this they utterly failed to do. Hence, the Board properly concluded that the Union lacked the necessary majority support when the Company recognized it as the representative of the previously unrepresented clerks.

III. Conclusion

In sum, we find that the Board properly applied its prior decisions to conclude that the unrepresented clerks employed by the Company could not lawfully be accreted to the existing bargaining unit without a showing of majority support among them for the Union and that the Union did not in fact enjoy majority support among them. Therefore, we grant the Board's petition for enforcement and deny the Company's and the Union's petitions for review.

So ordered.

APPENDIX B

D-2042
Rockledge, FL

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Case 12-CA-12749

UNITED PARCEL SERVICE, INC.

and

SARA F. GRIFFIN, an Individual

Case 12-CB-3028

TEAMSTERS NATIONAL UNITED PARCEL SERVICE NEGOTIATING COMMITTEE AND INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL 385, AFL-CIO, ITS AGENT

and

SARA F. GRIFFIN, an Individual

DECISION AND ORDER

The issue presented is whether Respondent United Parcel Service (UPS) and Respondent Teamsters violated Section 8(a)(1), (2), and (3) and Section 8(b)(1)(A) and (2) of the Act, respectively, by executing and main-

taining a collective-bargaining agreement in 1987 which extended an existing nationwide bargaining unit to include a group of employees who had historically been excluded from that unit. The judge found that the challenged action involved a lawful accretion.[1] For the reasons set forth below, we find merit in the General Counsel's exceptions to this finding.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,[2] findings, and conclusions only to the extent consistent with this Decision and Order.

UPS engages in the interstate transportation and distribution of parcels. Prior to 1979, approximately 220 local unions of the International Brotherhood of Teamsters had individual bargaining relationships with various UPS facilities located throughout the country. Operations clerks [3] were included in the bargaining unit at some facilities and were excluded from the unit at other facilities.

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[1] On July 27, 1990, Administrative Law Judge William N. Cates issued the attached decision. The General Counsel filed exceptions and a supporting brief. The Respondents filed briefs in opposition to the General Counsel's exceptions and in support of the judge's decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

[2] The judge granted the General Counsel's motion to strike attachments to the Respondent Employer's posttrial brief on the basis that these attachments were not part of the record. The Respondent Employer has not excepted to the judge's ruling but has appended the same documents to its answering brief. We have again stricken these documents and have not considered them in deciding the issues presented in this case.

[3] The term operations clerk refers to employees in the following classifications: rewrap clerk, bad address clerk, post card clerk, operating center clerk, air operations clerk, package return clerk, damage clerk, and hub and air-hub return clerks. The general function of operations clerk is to process packages through the system for ultimate delivery to the customers.

In 1979, UPS and the Teamsters executed their first National Master Agreement consolidating all previously represented units into a single nationwide bargaining unit. Article 1, section 2, of that agreement was entitled "Employees Covered" and stated "Employees covered by this Agreement shall be construed to mean, where already recognized . . . clerks." The term "clerks" referred to operations clerks.

Approximately 40 percent of UPS operations clerks had not previously been represented in a recognized Teamsters bargaining unit when the 1979 National Master Agreement was executed. Notwithstanding the contract reference to coverage of clerks "where already recognized," the Union asserted that all operations clerks should be covered by the 1979 agreement. The contrary view of UPS prevailed in practice, however, so that previously unrepresented operations clerks were excluded from the nationwide unit.

During negotiations for a new National Master Agreement in 1982, the Union proposed deletion of "where already recognized" from the "Employees Covered" section. UPS rejected this proposal. The language of that section in the new 1982 agreement remained the same as in its predecessor. Consequently, previously unrepresented operations clerks continued to be unrepresented.

On August 1, 1987, the parties executed a new 3-year National Master Agreement. This time the Union prevailed in its effort to include all operations clerks in the bargaining unit. The relevant portion of article 1, section 2, of the new contract contained revised language effectively recognizing the bargaining unit status of all UPS clerks. Those clerks who worked in States without "right-to-work" laws were obligated to comply with the new contract's union-security provisions.

At the time of the new contract's execution, UPS employed over 5000 operations clerks nationwide. It is un-

disputed that the functions of clerks excluded from the unit until 1987 were at all times the same as the functions of clerks traditionally included in the unit. It is also undisputed that the Employer did not ask for and the Union did not proffer proof of majority support for the Union in the group of previously unrepresented employees. An official of the Union testified about his belief that the Union had majority support in this group, but he admitted that he had no "papers," including authorization cards, to support this belief. The overall nationwide bargaining unit had more than 100,000 employees in 1987.

The Respondents contend that their expansion of the unit to include previously unrepresented operations clerks was a lawful accretion. As found by the judge, traditional community-of-interest factors relevant to the Board's analysis of accretion issues weigh heavily in favor of finding an accretion. The General Counsel contends, however, that the traditionally unrepresented group of operations clerks could not lawfully be accreted to the unit. In support of this contention, the General Counsel relies on the well-established Board principle precluding accretion where "the group sought to be accreted has been in existence at the time of recognition or certification, yet not covered in an ensuing contract, or, having come into existence, has not been part of the larger unit to which their accretion is sought or granted." *Laconia Shoe Co.*, 215 NLRB 573, 576 (1974).[4]

In the judge's opinion, the precedent cited by the General Counsel requires both historical exclusion of employees from a unit and acquiescence in that exclusion by the union involved. The judge found that, since the 1979 establishment of the nationwide bargaining unit in this case, the Respondent Union had never acquiesced to the exclusion of operations clerks who were not previously

[4] See also *Color Tech Corp.*, 286 NLRB 476, 487 (1987); *King Radio Corp.*, 257 NLRB 521, 525—526 (1981); *Sterilon Corp.*, 147 NLRB 219 (1964).

represented in local units. In addition, the judge noted the consensus of all litigant parties here that the Board has not had the occasion to apply the *Laconia Shoe* accretion bar in a case where the group of employees in dispute are not distinguishable by classification, job function, or geographic location from employees who have traditionally been included in the bargaining unit. Under these circumstances, the judge concluded that the historical exclusion of some operations clerks should not preclude their accretion to the existing unit. He therefore found the accretion to be lawful. We disagree.

In furtherance of the statutory duty to protect employees' right to select their bargaining representative, the Board follows a restrictive policy in finding accretion. See, e.g., *Towne Ford Sales,* 270 NLRB 311 (1984). One aspect of this restrictive policy has been to permit accretion only in certain situations where *new groups of employees* have come into existence after a union's recognition or certification or during the term of a collective-bargaining agreement. If the new employees have such common interests with members of an existing bargaining unit that the new employees would, if present earlier, have been included in the unit or covered by the current contract, then the Board will permit accretion in furtherance of the statutory objective of promoting labor relations stability. *Gould, Inc.,* 263 NLRB 442, 445 (1982).

No such accommodation of the collective-bargaining process is required or warranted, however, where the parties to a bargaining relationship have historically failed to include an existing group of employees from a bargaining unit. If a group of employees is in existence when a union is recognized or certified, then the statutory right of those employees to select a bargaining representative can be honored and they can be included in the unit at that time without any disruption of labor relations stability. If a group of employees comes into existence during the term of a contract for an existing unit, then the parties must

timely address the unit status of those employees prior to executing a successor agreement. Should they fail to do so, the parties have only themselves to blame for any instability resulting from the existence of a group of employees having interests in common with unit employees but excluded from representation in the unit.

The limitations on accretion discussed above and applied in *Laconia Shoe* and related precedent require neither that the union have acquiesced in the historical exclusion of a group of employees from an existing unit, nor that the excluded group have some common job-related characteristic distinct from unit employees. *It is the fact of historical exclusion that is determinative.* Here, for instance, it is undisputed that prior to 1979 a nationwide group of operations clerks at various UPS facilities were excluded from single-facility units and from 1979 to 1987 this same group of employees continued to be excluded from a nationwide multifacility unit under two successive collective-bargaining agreements. Moreover, although this factor does not affect the result here, the judge erred in finding that the Union had not acquiesced in the exclusion of the disputed group of operations clerks. At the very least, the Union's conscious abandonment of a proposal for the 1982 contract that would have specifically modified the unit to include all operations clerks sufficed to prove its acquiescence in continued exclusion of certain operations clerks during that contract's terms.[5]

Based on the foregoing, we find that the previously unrepresented group of operations clerks did not constitute an accretion to the nationwide bargaining unit of UPS employees represented by the Teamsters. Accordingly,

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[5] Compare *King Radio Corp., supra* at 526 (in successive contract negotiations, union sought extension of unit coverage to other plants but "always acquiesced" in respondent employer's position limiting recognized unit to single plant).

we find that the Respondents violated Section 8(a)(1), (2), and (3) and Section 8(b)(1)(A) and (2) of the Act, respectively, by executing and maintaining a collective-bargaining agreement in 1987 which extended an existing nationwide bargaining unit to include a group of employees who had historically been excluded from that unit and a majority of whom did not support the Union.

Conclusions of Law

1. The Respondent Employer, by recognizing and entering into a contract with the Respondent Union as the collective-bargaining representative of a bargaining unit including a group of previously unrepresented operations clerks, at a time when a majority of those employees had not designated that Union as their representative, and by tendering to the Respondent Union dues collected from the pay of certain previously unrepresented operations clerks in States where a contractual union-security clause was lawful and operative, has engaged in unfair labor practices within the meaning of Section 8(a)(3), (2), and (1) of the Act.

2. The Respondent Union, by accepting exclusive recognition as the representative of a group of previously unrepresented UPS operations clerks at a time when it was not designated as the exclusive representative by a majority of such employees, and by receiving dues deducted from the pay of certain previously unrepresented operations clerks in States where a contractual union-security clause was lawful and operative, has engaged in unfair labor practices within the meaning of Section 8(b)(1)(A) and (2) of the Act.

3. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that the Respondents have engaged in certain unfair labor practices, we shall order that they cease and desist and take certain affirmative action designed to effectuate the policies of the Act. Having found that Respondent UPS unlawfully recognized and entered into a collective-bargaining agreement on August 1, 1987, with the Respondent Union as the representative of previously unrepresented operations clerks, we shall order Respondent UPS to withdraw and withhold all recognition from the Respondent Union as the collective-bargaining representative of those employees, and we shall order both Respondents to cease applying to those employees the terms of the Respondents' August 1, 1987 collective-bargaining agreement, or any extension, renewal, modification, or superseding agreement,[6] unless or until the Respondent Union is certified by the Board as such representative.

We shall also order that the Respondent Union and Respondent UPS, jointly and severally, reimburse previously unrepresented operations clerks, present and former, for dues and initiation fees involuntarily exacted from them as a result of the unlawful application of the union-security clause in the Respondents' collective-bargaining agreement, with interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

ORDER

The National Labor Relations Board orders that

A. Respondent Employer United Parcel Service, Inc., Rockledge, Florida, its officers, agents, successors, and assigns, shall

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[6] Nothing in this decision should be construed as requiring Respondent UPS to rescind benefits conferred on the group of previously unrepresented operations clerks as the result of the unlawful application of contract provisions to them.

1. Cease and desist from

(a) Encouraging membership in Teamsters National United Parcel Service Negotiating Committee and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 385, AFL-CIO, its agent, by recognizing it as the exclusive representative of a group of previously unrepresented operations clerks at a time when the labor organization has not been designated by a majority of those employees as their representative.

(b) Applying the terms of its collective-bargaining agreement of August 1, 1987, or any other agreement with the Union, to previously unrepresented operations clerks unless and until it has been duly certified by the National Labor Relations Board as the exclusive representative of those employees.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Withhold and withdraw all recognition from the Respondent Union as the exclusive representative of previously unrepresented operations clerks unless and until it has been duly certified by the National Labor Relations Board as the exclusive representative of those employees.

(b) Jointly and severally with the Respondent Union, reimburse all previously unrepresented operations clerks for any initiation fees, dues, or other moneys involuntarily exacted from them pursuant to application of a union-security clause in the Respondents' collective-bargaining agreement executed on August 1, 1987, or any other agreement between the Respondents, in the manner set forth in the remedy section of this decision.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at all facilities employing unrepresented operations clerks copies of the attached notice marked "Appendix A." [7] Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent Employer's authorized representative, shall be posted by the Respondent Employer immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent Employer to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent Employer has taken to comply.

B. Respondent Union Teamsters National United Parcel Service Negotiating Committee and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 385, AFL-CIO, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Accepting exclusive recognition as the representative of all previously unrepresented operations clerks of

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[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

the Respondent Employer, at a time when it was not designated as the exclusive representative by a majority of those employees.

(b) Applying the terms of its collective-bargaining agreement of August 1, 1987, or any other agreement with the Respondent Employer, to previously unrepresented operations clerks, unless and until it has been duly certified by the National Labor Relations Board as the exclusive representatives of those employees.

(c) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Jointly and severally with the Respondent Employer reimburse all newly added and previously unrepresented operations clerks for any initiation fees, dues, or other moneys involuntarily exacted from them pursuant to application of a union-security clause in the Respondents' collective-bargaining agreement executed on August 1, 1987, or any other agreement between the Respondents, in the manner set forth in the remedy section of this remedy.

(b) Post at its business offices serving members at any United Parcel Service facility where previously unrepresented operations clerks are located copies of the attached notice marked "Appendix B."[8] Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent Union's authorized representative, shall be posted by the Respond-

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[8] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

ent Union immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent Union to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent Union has taken to comply.

Dated, Washington, D.C.

June 11, 1991

DENNIS M. DEVANEY, Member

CLIFFFORD R. OVIATT, JR., Member

JOHN N. RAUDARBAUGH, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX A

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Goverment

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT encourage membership in Teamsters National United Parcel Service Negotiating Committee and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 385, AFL-CIO, its agent, by recognizing it as the exclusive representative of a group of previously unrepresented operations clerks at a time when it has not been designated by a majority of those employees as their representative.

WE WILL NOT apply the terms of our collective-bargaining agreement of August 1, 1987, or any other agreement with the Union, to previously unrepresented operations clerks unless and until it has been duly certified by the National Labor Relations Board as the exclusive representative of those employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL withhold and withdraw all recognition from the Union as the exclusive representative of previously unrepresented operations clerks unless and until it has been duly certified by the National Labor Relations Board as the exclusive representative of those employees.

WE WILL jointly and severally with the Union make whole all previously unrepresented operations clerks for any initiation fees, dues, or other moneys involuntarily exacted from them and paid to the Union pursuant to ap-

plication of a union-security clause in the collective-bargaining agreement executed on August 1, 1987, or any other agreement with the Union.

UNITED PARCEL SERVICE, INC.

_____

(Employer)

Dated _____ By _____

(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 700 Twiggs Street, Suite 511, Tampa, Florida 33602-4081, Telephone 813-228-2662.

APPENDIX B

NOTICE TO EMPLOYEES AND MEMBERS

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT accept exclusive recognition as the representative of all previously unrepresented United Parcel Service, Inc. operations clerks at a time when we are not designated as the exclusive representative by a majority of those employees.

WE WILL NOT apply the terms of our collective-bargaining agreement of August 1, 1987, or any other agreement with United Parcel Service, Inc. to previously unrepresented operations clerks, unless and until we have been duly certified by the National Labor Relations Board as the exclusive representative of those employees.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL jointly and severally with United Parcel Service, Inc. make whole all previously unrepresented operations clerks for any initiation fees, dues, or other moneys involuntarily exacted from them and paid to us pursuant to application of a union-security clause in the collective-bargaining agreement executed on August 1, 1987, or any other agreement with United Parcel Service, Inc.

TEAMSTERS NATIONAL UNITED PARCEL SERVICE NEGOTIATING COMMITTEE AND INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL 385, AFL-CIO, ITS AGENT

_____

(Labor Organization)

Dated By

(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 700 Twiggs Street, Suite 511, Tampa, Florida 33602-4081, Telephone 813-228-2662.

JD(ATL)-39-90
Rockledge, FL

UNITED STATES OF AMERICA BEFORE THE
NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

Case 12-CA-12749

UNITED PARCEL SERVICE

and

SARA F. GRIFFIN, An Individual

Case 12-CB-3028

TEAMSTERS NATIONAL UNITED PARCEL SERVICE NEGOTIATING COMMITTEE AND INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, LOCAL 385, AFL-CIO, its agent

and

SARA F. GRIFFIN, An Individual

Peter J. Salm and Michael R. Maiman, Esqs., for the General Counsel.

Martin Wald and Edward J. McBride, Jr., Esqs., Philadelphia, PA, for the Company.

A. E. Lawson, Esq., Washington, DC, for the Union.

DECISION

Statement of the Case

WILLIAM N. CATES, Administrative Law Judge. These cases were tried before me at Orlando, Florida, on January 8 and 9, 1990, pursuant to an Order Consolidating Cases, Consolidated Complaint, and Notice of Hearing (complaint) issued by the Acting Regional Director for Region 12 of the National Labor Relations Board (Board) on April 25, 1989, which in turn was based upon charges filed by Sara F. Griffin, an individual (Griffin). An amendment to the complaint was issued by the Acting Regional Director on September 26, 1989. The charge in Case 12-CA-12749 was filed on November 3, 1987. The charge in Case 12-CB-3028 was also filed on November 3, 1987, and amended on December 22, 1988. The complaint alleges that United Parcel Service (Company) on or about August 1, 1987, violated Section 8(a)(1), (2), and (3) of the National Labor Relations Act (Act) by recognizing Teamsters National United Parcel Service Negotiating Committee and International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local 385, AFL-CIO, its agent (Union) as the collective bargaining representative of certain previously unrepresented operations clerks at the time when a majority of those employees had not designated the Union as their collective bargaining representative and by tendering to the Union dues collected from the pay of certain previously unrepresented operations clerks pursuant to a union security clause in non-right-to-work states. It is also alleged the Union violated Section 8(b)(1)(A) and (2) of the Act by receiving dues deducted from the pay of certain previously unrepresented operations clerks in non-right-to-work states pursuant to a union security clause at a time when the Union did not represent a majority of certain previously unrepresented operations clerks and by causing the Company to discriminate against certain of its employees in

violation of Section 8(a)(3) of the Act.[1] The Company and Union filed answers admitting certain complaint allegations but denying the commission of any unfair labor practices.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Briefs, which I have carefully considered, were filed on behalf of the General Counsel, the Company, and the Union.[2]

Upon the entire record of the case and from my observation of the witnesses and their demeanor, I make the following:

Findings of Fact

I. Jurisdiction

The Company, an Ohio and New York corporation, has offices and places of business in various states including its place of business located at Rockledge, Florida, where it is engaged in the interstate transportation and distribution of parcels. During the 12-month period preceding issuance of the complaint herein, a representative period, the Company, in the course and conduct of its

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[1] The complaint also contained alleged independent violations of Section 8(b)(1)(A) of the Act. However, those allegations were served from the complaint at trial and resolved pursuant to an informal settlement agreement that I approved prior to close of the hearing herein.

[2] On March 19, 1990, Counsel for the General Counsel filed a Motion to Strike Attachments to Respondent-Employer's Post Hearing and All References Thereto. In said Motion, Counsel for the General Counsel moved to strike certain daily labor reports that were attached to the Company's posttrial brief. Counsel for the General Counsel's contention that such reports were never made a part of the record in this case has merit. Accordingly, I shall strike the documents appended to the Company's posttrial brief. I have given no consideration to the attachments or references made in the Company's posttrial brief to the attachments.

business operations, performed interstate freight transportation services valued in excess of $50,000. During that same period, it received gross revenues in excess of $500,000 as a link in the interstate movement of freight. The complaint alleges, the parties admit, the evidence establishes, and I find, the Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. Labor Organization

The complaint alleges, it is admitted, and I find, the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

A. *The Facts*[3]

Union Local 385 along with approximately 220 other union locals nationwide has represented certain Company employees including operations clerks[4] for many years within their respective jurisdictions. The various geographical units were, by practice and consent, merged into a single nationwide bargaining unit. The nationwide unit consists of approximately 108,000 employees. Since 1979, national negotiations have been conducted between the Company and the Union's national negotiating committee that represents all union locals. Between 1979

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[3] The facts set forth herein have been taken from a joint stipulation of facts entered into by the parties, admissions made by the parties, and from credited uncontradicted testimony of certain witnesses, whose identity will be set forth at those places in the Decision where their testimony is utilized and/or relied upon.

[4] The generic term "operations clerks" refers to the classifications of: re-wrap clerks, bad address clerks, postcard clerks, operating center clerks, air operations clerks, package return clerks, damage clerks, and hub and air-hub return clerks. Their duties are discussed in greater detail elsewhere in this Decision.

and 1987, three national collective-bargaining agreements were negotiated with effective dates of 1979, 1982, and August 1, 1987.[5]

Article 1, section 2, of the 1979 National Agreement entitled "Employees Covered" reads as follows:

> Employees covered by this Agreement shall be construed to mean, where already recognized, feeder drivers, package drivers, sorters, loaders, unloaders, porters, office clericals, clerks,[6] mechanics, maintenance personnel (building maintenance), car washers, and other employees of the Employer for whom a signatory Local Union is presently the bargaining representative.
>
> The provisions of this agreement shall apply to all accretions to the bargaining unit in the classifications listed in the applicable individual Supplements.

Company Air and Midwest Regional Manager Morton testified there probably were more than 1,000 but less than 5,000 operations clerks utilized by the Company at the time the parties entered into the 1979 National Agreement.

The first paragraph of article 1, section 2, of the 1982 National Agreement reads as follows:

> Employees covered by this agreement shall be construed to mean, where already recognized, feeder drivers, package drivers, sorters, loaders, unloaders, porters, office clericals, clerks, mechanics, maintenance personnel (building maintenance), car washers, United Parcel Service employees in the employ-

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[5] The most recent agreement expires by its terms on July 31, 1990.

[6] Company Air and Midwest Regional Manager Roy Morton (Morton) testified without contradiction that the term "clerks" as used in this agreement referred to "operations clerks."

> er's air operations, and other employees of the employer for whom a signatory Local Union is or may become the bargaining representative.

The second paragraph of article 1, section 2, of the 1982 National Agreement was identical to the second paragraph of article 1, section 2, of the 1979 agreement.

As is noted above, at the time the 1979 contract became effective, some operations clerks throughout the country were represented by the Union in recognized units, while other operations clerks were not. Thus, after 1979, some operations clerks were treated as being covered under article 1, section 2, of the 1979 and 1982 agreements while others were treated as being unrepresented.[7]

Air and Midwest Regional Manager Morton testified the Union had always, over the years, taken the position it represented *all* employees having anything to do with the movement of packages from the time the packages were tendered to the Company until such packages were delivered to the customers. Morton testified the Union interpreted the recognition clause of the 1979 contract as covering *all* operations clerks employed by the Company nationwide. Morton stated that although the Company did not share that interpretation of the collective-bargaining agreement by the Union, the Union nonetheless continued to complain about the Company's failure to do so. According to Morton, the complaints were not limited to the national level but union locals also objected that the Company did not treat all operations clerks as being members of the bargaining unit.[8] Morton testified that

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[7] The Company's growth in volume as well as the additional need for operations clerks increased approximately 6 to 7 percent on an annual basis between 1979 and 1987.

[8] Two grievances were filed on May 5, 1980. One each by Local 435 (Denver, Colorado) and Local 146 (location not available in

until the 1987 agreement, the status of *all* operations clerks "was a constant bone of contention between the Company and the Union." Morton testified that during the 1982 negotiations, one of the proposals made by the Union was to modify the "Employees Covered" section of the agreement. The Union's proposal would have changed the recognition clause from:

> Employees covered by this agreement shall be construed to mean, where already recognized, feeder drivers, package drivers, sorters, loaders, unloaders, porters, office clericals, clerks—

To:

> Employees covered by this agreement shall include . . . clerks.

Morton said the Company, however, did not agree to this proposed change in 1982.

Morton testified that during the 1987 negotiations, the Union finally convinced the Company its (Union's) interpretation of the recognition clauses in the 1979 and 1982 agreements was correct and that *all* operations clerks should properly be considered as being in the bargaining unit.[9] As a result thereof, the second paragraph of article 1, section 2 (which has been quoted above), was changed to read as follows:

> In addition, effective August 1, 1987, the Employer recognizes as bargaining unit members clerks who

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the record) in which the locals complained the Company refused to recognize the Union as the collective bargaining representative for the operations clerks. G.C. Exhibit 3.

[9] No specific evidence of majority status was requested by the Company or provided by the Union at the time the 1987 agreement was executed which contained the language pertaining to *all* operations clerks being included in the bargaining unit.

> are assigned to package center operations, hub center operations, and/or air-hub operations who assignment involves the handling or progressing of merchandise after it has been tendered to United Parcel Service to effectuate delivery. These jobs cover: package return clerks, bad address clerks, postcard room clerks, damage clerks, re-wrap clerks, and hub and air-hub return clerks. Classifications covered in Article 39—Trailer repair shop are also covered.

There were over 5,000 operations clerks employed by the Company nationwide in 1987.[10] Some operations clerks newly included in the unit under the 1987 agreement who were employed in non-right-to-work states, executed bargaining authorization cards and checkoff authorizations and, pursuant thereto, have had dues and initiation fees deducted from their pay by the Company. Said dues have been tendered to and received by the Union. The 1987 National Agreement contains a union security clause that is applicable to the extent allowed by state law.

At this point, a detailed look at the functions of the operations clerks is helpful. The generic term "operations clerks" refers to employees who work along side sorters, loaders, and drivers in processing packages to be transported by the Company. Their job functions include, inter alia, correcting addresses on packages, re-wrapping packages, redirecting packages sent to a location by mistake and returning damaged packages with claim forms. Company labor relations staff member Edward R. Lenhart (Lenhart) testified:

> . . . . Probably the best way to describe the operation at [The Company] is go through the delivery cycle

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[10] Prior to August 1987, the terms and conditions of employment of the unrepresented operations clerks were governed by a clerical employee's handbook, which handbook had no effect on unit employees.

and then have the fill in or clerical people come into play . . .

Package driver[s] pickup packages at accounts on a daily basis at their regular customers; they transport those . . . packages into the package center, which may be an independent center housed in its own confines or it may be a center as part of a hub. At that time, the packages were unloaded. The packages are unloaded by a hub person. That hub person then places them on the belt. The packages then go through the sorting belt system to be sorted to the destination trailers. . . .

During any of this portion of the package delivery cycle, clerical people can come into play. If a package is unloaded that needs to be taped, a clerical person, a rewrap person may, with a tape gun, put tape on that package so as to keep the package on its way. If a package is off loaded and the package is damaged, a damage clerk may be involved in rewrapping that package, discovering what's demaged, fill out the appropriate damage reports, causing that package either to go on its way back to the shipper or to a designated place for other treatment, depending on the type of merchandise it is.

The packages are then loaded into destination trailers. They are pulled by feeder drivers to the destination center. They are unloaded at the destination center, again, by hub people, placed on belts, loaded by a group of people called the pre-loaders. Pre-loaders can operate off of running belts or off of box lines or cage lines, or whatever the case may be. Those pre-loaders place the packages into package cars for the delivery driver to deliver packages on that particular delivery day.

Then the pre-load operation, as well as the unload operation, as well as the sort operation, packages can

become damage[d], packages may need rewrapped. Packages may on the pre-load be recognized as having an incorrect address, either missing a digit, having an incorrect zip code, and the clerical people would be involved at that time in correcting the addresses for the pre-loader.

Once the packages leave the center, the delivery driver is responsible for making the deliveries. If for whatever reason he cannot make those deliveries, he would then, on his return to the center, indicate to the clerical person who is on duty at that time why he could not affect delivery on certain packages that he returned.

Again, they could have bad addresses that the driver discovered on area; they could be in need of rewraps and the driver chose not to deliver the packages because of the appearance of the package; they could have had damage that he'd noticed and the preloaders hadn't noticed; they could have been refused by the consignee and then need to have the appropriate paperwork filled out for the return; they could be packages that have postcard delivery addresses and the driver's unfamiliar with the consignee and could not affect the delivery, gives it to the return clerk upon his return to the center and they fill out the appropriate paperwork to notify the customer via the US mail, the postcard system; it could be COD's that were refused; it could be—you know, it could be a variety of reasons.

* * *

The air return clerk . . . is one that works in an airhub. . . . . Performs the same type of clerical work, but they just have to do with air packages because of his or her location in the airhub.

Lenhart testified without contradiction that the operations clerks work "shoulder to shoulder" "at all times" with other unit employees. He further testified:

> They converse with them on work related matters, they receive packages from those classifications, they give packages back to those classifications, they ask those classifications for information.

He testified, for example:

> They may ask a driver for information concerning a customer for correction of a bad address. There's so much interplay that, I mean, they're all part of the same team . . . .

Lenhart testified the working conditions for the operations clerks and, for example, the drivers, sorters, loaders, and unloaders are identical. Lenhart said they take their breaks together, adhere to the same grooming standards, share the same locker and personal storage space and utilize the same lunch room and parking facilities. The operations clerks and other unit employees are under the same supervision.

B. *Positions of the Parties*

Counsel for the General Counsel urges that the application of the 1987 national agreement to those operations clerks not covered under the 1979 and 1982 agreements did not constitute a lawful accretion. Counsel for the General Counsel urges the Board follows a restrictive policy in finding an accretion because such a finding forecloses employees' basic right to select their own bargaining representative. In this regard, Counsel for the General Counsel points out that a fundamental consideration in determining accretion issues is to insure employees the fullest freedom in exercising their rights guaranteed by the Act. Counsel for the General Counsel does not contend the factors generally militating in favor of a finding of an accretion are not present in the instant case but rather argues there is a factor present in the case sub judice that precludes an accretion finding. Counsel for the General Counsel asserts that where the group sought to be accreted, as he contends is the case herein, was in existence

at the time of the recognition or certification and not covered in ensuing contracts the Board will not permit accretion without an election or a showing of majority status. Counsel for General Counsel argues the fact that some employees in the classifications claimed to be accreted into the unit have always been in the unit should not cause this case to be treated differently than a traditional accretion case and that the preclusion principle should apply. Further, Counsel for the General Counsel asserts there is no evidence on this record that the Union represented a majority of the operations clerks at the time all were added to the unit in 1987. Thus, he asserts no lawful basis for the Company's and Union's actions has been demonstrated and a finding that both violated the Act as alleged in the complaint is warranted.

Counsel for the General Counsel, in responding to certain defenses raised or anticipated, contends the plain language in the recognition clauses of the 1979 and 1982 national agreements defeats any inference the agreements were intended to cover *all* operations clerks. In support thereof, Counsel for the General Counsel points to that portion of the recognition clauses in both agreements that reads "employees covered by this agreement shall be construed to mean, where already recognized, . . . [operations] clerks . . ." While Counsel for the General Counsel concedes that some of the operations clerks were covered under the approximately 220 local agreements prior to 1979, he asserts all were not, and that all were not intended to be, covered under those agreements. Counsel for the General Counsel argues that since the above recognitional language remained in the parties' two national agreements, lasting approximately 8 years, they condoned the fact some operations clerks were covered by the two agreements while others were not. Simply stated, Counsel for the General Counsel urges it cannot be concluded that the 1979 and/or 1982 agreements were intended to cover *all* operations clerks employed by the Company.

The Union contends it has always represented a majority of *all* operations clerks in that a majority of those clerks were indeed covered under the 1979 and 1982 National Agreements. Furthermore, the Union asserts it has continuously sought to have the minority of operations clerks not included in the unit be added thereto. The Union argues the complaint, as to it should be dismissed in that no showing has been made that non-bargaining unit operations clerks were other than a minority of the overall operations clerks. Further, the Union argues that since the overall national bargaining unit consists of 108,000 unit employees, the small percentage of non-bargaining unit employees added under the 1987 collective-bargaining agreement constitutes nothing more than a de minimis adjustment of the composition of the unit in order "to establish national uniformity, and to clarify [the Company's] pre-existing de facto recognition of the majority of these operations clerks, already bargaining unit members." Such, the Union contends, is consistent with the policies and purposes of the Act and as such does not constitute an unfair labor practice.

The Union argues that if the instant case is to be viewed as an accretion case, it is undisputed that a majority of the employees in the classifications to be accreted were already bargaining unit employees. As such, the Union argues the Board's general doctrine of denying accretion in a situation where an employee classification has previously been excluded from a collective-bargaining agreement should not apply to, or control, the disposition of the instant case. The Union urges the Board's line of cases precluding accretion where the employee classification has been excluded are clearly distinguishable in that in none of those cases were the employee classifications to be accreted already bargaining unit members as was stipulated to be the case herein. The Union urges that since the employees brought into the unit by the 1987 agreement constituted a relatively small percentage of the overall unit, and the employees

shared a sufficient community of interest with the unit employees they should be considered an accretion to that unit especially in light of the fact the accreted employees do not have a community of interest sufficiently separate and distinct so as to preclude their accretion into the bargaining unit. In this regard, the Union notes the operations clerks involved have historically been included in the unit in most parts of the country because their job functions are integrated with the job functions of other members of the bargaining unit. The Union urges that as a matter of law, the inclusion of the unrepresented operations clerks into the existing bargaining unit in 1987 constituted a proper accretion to the existing bargaining unit and as such the complaint as to it should be dismissed.

The Company contends the agreement to add new language to the "Employees Covered" section of the 1987 national agreement that treated *all* operations clerks as bargaining unit members, merely clarified the fact *all* operations clerks had been bargaining unit members under the 1979 and 1982 agreements. The Company asserts the Union always interpreted the recognition clauses of the prior agreements to mean *all* operations clerks were bargaining unit employees. The Company claims the Union always tried, although unsuccessfully until 1987, to persuade it of the correctness of its interpretation of the prior agreements. The Company asserts the Union based its interpretation on the fact that when the first national agreement was executed in 1979, the Union, through its locals in various parts of the country already represented a majority of all operations clerks employed by the Company. The Company contends it finally agreed to the Union's interpretation because the added language covered something that factually already existed. Thus, the Company urges it did not violate the Act by agreeing to language in the 1987 agreement that reflected what in fact already properly existed.

The Company, like the Union, contends that assuming accretion principles apply to the instant case, the operations clerks were lawfully accreted into the bargaining unit in 1987 because prior Board cases regarding accretion of previously excluded classifications are not applicable and because a community of interest with unit employees is clearly present such as to warrant an accretion finding. The Company, like the Union, points out that in those cases where the Board has treated the accretion issue in the context of a classification previously excluded none of the classifications to be accreted had ever been part of the bargaining unit. The Company asserts the instant case is one of first impression in that a majority of the employees in the classifications to be accreted are already members of the bargaining unit. The Company urges that the instant case is an accretion case, if at all, only in the narrowest sense—what is to be accreted is a group of employees who work in job classifications which are already a part of the unit. The Company contends a finding of lawful accretion in the instant case will advance the Board's policy of promoting the peaceful resolution of industrial disputes through the collective bargaining process. The Company urges the dismissal of all complaint allegations against it.

C. *Analysis, Discussion, and Conclusions*

I reject the Company's and Union's position that by adding language to the 1987 national agreement to treat *all* operations clerks as bargaining unit members, the parties were merely clarifying the fact *all* had been bargaining unit members under the two previous national agreements. I likewise reject the contention the language change was nothing more than a de minimis adjustment of the unit composition. The evidence establishes that prior to the first (1979) national agreement, some Union locals considered operations clerks to be covered under the local agreements while others did not. The language

"where already recognized" regarding employees covered under the 1979 agreement, which language was retained in the 1982 agreement, indicates the parties intended to maintain the status quo—that is in those locations where operations clerks were previously considered to be in the unit such would continue to be so while those considered not to be included would remain in that status. The Company and Union having failed to demonstrate that the additional recognitional language in the 1987 agreement was simply a clarification of what in fact already existed, I shall turn to the central issue of whether the employees added to the unit in 1987 constituted a lawful accretion.

The Court in *Lammert Industries v. NLRB*, 578 F.2d 1223, 1225 at fn. 3 (7th Cir. 1978) noted:

> An accretion is simply the addition of a relatively small group of employees to an existing unit where these additional employees share a sufficient community of interest with the unit employees and have no separate identity. The additional employees are then properly governed by the unit's choice of bargaining representative. *NLRB v. Food Employers Council, Inc.*, 399 F.2d 501, 502-03 (9th Cir. 1968).

In *King Radio Corporation*, 257 NLRB 521 at 525 (1981), the Judge, with approval, noted the Board weighs a variety of factors in determining whether a particular group of employees constitute an accretion to an existing unit. Such factors are: (1) integration of operations; (2) centralization of administration and management control; (3) geographic proximity; (4) similarity of working conditions and skills; (5) labor relations control; (6) common or separate supervision, and (7) bargaining history. Where there are factors militating toward and against accretion a balancing of the factors is necessary. That is, the Board must balance the right of employees to express their desires concerning representa-

tion against the policy favoring continuity in collective bargaining relationships. Although the Board generally follows a somewhat restrictive rather than expansive policy in finding an accretion in order to ensure employees the fullest freedom in expressing their rights under the Act, it is not hesitant to find an accretion where the facts warrant such. The bottom line is that the Board will very carefully weigh every factual situation in balancing the implicit statutory policy of stability in bargaining relationships against the expressed statutory right of employees, as set forth in Section 7 of the Act, to choose to refrain from engaging in collective bargaining.

In applying the Board's *traditional* community of interest analysis to the instant case, I am persuaded the facts overwhelmingly militate in favor of a finding of accretion. The facts establish the Company's packaged delivery operations are highly integrated with the operations clerks fulfilling vital and necessary roles at most all stages of the Company's operations. When packages are brought from customers to hub or air hub centers and unloaded, operations clerks work alongside the unloaders and sorters re-wrapping and/or re-taping packages. Packages that are damaged beyond delivery and are to be returned to the customers are processed by operations clerks in the return clerks classification. The return clerks insure the packages, as well as the related paper work, are prepared and processed so loaders can reload the packages and drivers can return the packages to the customers. Likewise, operations clerks assist loaders, unloaders, and sorters in ascertaining correct and complete addresses for packages brought to the hub without correct, proper or complete addresses. The parties stipulated the operations clerks perform their work "alongside sorters, loaders, and drivers [unit members] in processing packages to be transported" by the Company. The working conditions of the operations clerks are identical to other inside employees that are unit members. The operations clerks at each hub or air hub report to the same supervision as do

bargaining unit members. As more fully discussed, inter alia, the parties' bargaining history demonstrates operations clerks at various locations have traditionally been part of the bargaining unit. Simply stated, the functions performed by the operations clerks are the same as those performed by bargaining unit members, namely, progressing packages through the system for ultimate delivery to the customers. The operations clerks who were not considered as already being in the unit constitute a small percentage of the overall unit and do not form a separate unit of their own. Absent some valid reason for not applying the *traditional* community of interest analysis to the instant case, I would find the operations clerks that were not previously included in the bargaining unit but that were brought into the unit by the 1987 national agreement were properly merged into or included in the overall unit by accretion.

There are, however, a line of cases in which the Board has not permitted accretion where the classification to be accreted has been excluded from the unit by a collective-bargaining agreement. See, e.g., *Sterilon Corporation*, 147 NLRB 219 (1964); *Laconia Shoe Company, Inc.*, 215 NLRB 573 (1974); *King Radio Corporation*, supra; and *Color Tech Corp.*, 286 NLRB 476 (1987). Counsel for the General Counsel, as noted earlier, urges this line of cases controls the instant case while the Company and Union argue to the contrary. A closer look at the above cases is necessary. The Board, for example, in *Laconia Shoe*, supra, adopted the Judge's decision wherein he held:

> The single most crucial factor in any 'accretion case' under settled Board law [the Judge cited *Sterilon Corporation* as the 'lead' case in this respect] is whether the group sought to be accreted has been in existence at the time of recognition or certification, yet not covered in an ensuing contract, or, having come into existence, has not been part of the

> larger unit to which their accretion is sought or granted.

The Judge in *Laconia Shoe*, supra, further held:

> . . . . When a group has in fact been excluded for a significant period of time from an existing production and maintenance unit, the Board will not permit their accretion without an election or a showing of majority among them even if no other union could attain representative status for them.

In the *Sterilon Corporation* case, supra, which was relied upon by the judge in *Laconia Shoe*, supra, the Board held *two* factors needed to be present in order to preclude or bar a finding of accretion. Namely, prior exclusion from a unit and acquiescence therein by the union involved. In the *Sterilon Corporation* case, supra, the union had never attempted during the 11-year existence of the unit to have the disputed classification included in the unit. The Judge in *Laconia Shoe*, supra, did not specifically state that both of the above factors had to be present to preclude or bar an accretion finding but he did consider acquiescence to be a relevant factor when he considered and rejected a contention the union's failure to seek to represent the disputed classification was due to the union's belief the disputed classification was already included in the unit. In the *Color Tech* case, supra, the Judge considered and rejected a contention that any acquiescence was not knowing because the union was unaware of the character of the work being performed by the classification sought to be accreted. Although it is perhaps not as clear as the parties might wish, I am persuaded the Board still adheres to the teachings in *Sterilon Corporation*, supra, that both prior exclusion from a unit and acquiescence by the union involved must be present to bar an accretion.

All of the parties acknowledge the case sub judice differs from the above cases in that in none of the above

cases was the Board confronted with the situation where a large percentage of the employees in the classifications to be accreted were already members of the bargaining unit. Stated differently, none of the classifications to be accreted in the above-cited cases had ever been a part of the bargaining unit. Counsel for the General Counsel contends that since an identifiable group of employees had been excluded for two consecutive contracts (1979 and 1982), the principles of *Laconia Shoe*, supra, should apply notwithstanding the fact that approximately half the employees in the same job classifications (operations clerks) had been treated as being in the unit. Counsel for the General Counsel appears to be asserting that because the recognition language in the 1979 and 1982 national agreements covered only those operations clerks already in the unit that the status of the remaining operations clerks should be governed by the principles established in the above-cited cases. The Company and Union urge such cases are not controlling herein. In support of its position that the above-cited cases should not be controlling the Company points with emphasis to the fact the classifications to be accreted in the instant case have, from the very first national agreement, been included in the unit with only some employees at some locations being considered as not being included. The Company argues the proper subject of focus in an accretion case is the classification accreted and not the employees per se. In this regard and in further support of its position, the Company points out the parties stipulated that the pre-1987 bargaining unit included employees in the operations clerks classifications. Thus, the Company, as noted earlier, urges the instant case is an accretion case in only the narrowest sense—what is to be accreted is a group of employees who work in job classifications which are already a part of the national unit. All parties agree the instant case is one of first impression.

In what appears to be an absence of Board precedence, I am persuaded a determination of the lawfulness of the

accretion issue herein will require consideration of the various purposes (expressed and implied) of the Act—some of which have been alluded to earlier in this Decision. A finding of a lawful accretion herein will provide stability in the bargaining relationship and will lessen the potential for union-employer discord. I note the issue of the inclusion of *all* operations clerks in the national unit has been a constant bone of contention between the parties until the 1987 agreement. Eliminating this type strife between the Company and the Union, in my opinion, effectuates the purposes of the Act. This is especially so where, as is the case herein, the classifications to be accreted are already included in the unit with a large percentage of the employees in those classifications already covered under prior agreements. Furthermore, the record reflects that only one objection, (the Charging Party herein), has been raised to *all* operations clerks being included in the unit of approximately 108,000 employees. A finding of an accretion in the instant case will not, in my opinion, improperly disenfranchise certain of the operations clerks at certain locations inasmuch as the job classifications involved have been covered under the national agreements since the first such agreement was executed in 1979. Inasmuch as a strong community of interest exists between the operations clerks to be accreted and the operations clerks already in the unit and inasmuch as a finding of accretion would favor continuity in the collective bargaining relationship and eliminate the potential for discord, I conclude the above-cited cases do not constitute an impediment [11] to the find-

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[11] Although it is not as clear as perhaps it could be, I am persuaded the Board requires a finding that both factors, prior exclusion and acquiescence, be present to bar an accretion finding. There was no acquiescence by the Union herein. It, through its various locals and at the national level, continuously from the beginning objected to the fact the Company did not consider *all* operations clerks at *all* locals to be included in the national unit.

ing, which I make, that the operations clerks not previously covered under the parties' national agreements were lawfully accreted into the unit in 1987.[12]

Accordingly, inasmuch as I have found a lawful accretion herein, I shall dismiss all complaint allegations against both the Company and the Union.

Conclusions of Law

1. The Company, United Parcel Service, is an employer engaged in commerce within the meaning of 2(2), (6), and (7) of the Act.

2. Teamsters National United Parcel Service Negotiating Committee and International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local 385, AFL-CIO, its agent, is a labor organization within the meaning of Section 2(5) of the Act.

3. Neither the Company nor the Union has engaged in the unfair labor practices alleged in the complaint.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended:

ORDER

The complaint is dismissed in its entirety.

Dated at Washington, D.C. July 27, 1990.

/s/ William N. Cates
WILLIAM N. CATES
Adminisrative Law Judge

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[12] A finding concerning majority status by the Union among those newly accreted operations clerks is not necessary and is not made.

APPENDIX C

[Filed Jul. 20, 1994]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 91-1314

TEAMSTERS NATIONAL UNITED PARCEL SERVICE NEGOTIATING COMMITTEE AND INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL 385, AFL-CIO,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

and Consolidated Case No. 91-1317

BEFORE: Mikva, Chief Judge; Wald, Edwards, Silberman, Buckley, Williams, Ginsburg, Sentelle, Henderson, Randolph and Rogers, Circuit Judges

ORDER

Petitioner's Suggestion For Rehearing *In Banc* has been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing it is

ORDERED, by the Court *in banc*, that the suggestion is denied.

Per Curiam

FOR THE COURT:

RON GARVIN
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

[Filed Jul. 20, 1994]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 91-1314

TEAMSTERS NATIONAL UNITED PARCEL SERVICE NEGOTIATING COMMITTEE AND INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL 385, AFL-CIO,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

and Consolidated Case No. 91-1317

BEFORE: Buckley, Ginsburg and Henderson, Circuit Judges

ORDER

Upon consideration of petitioner's petition for rehearing, filed May 9, 1994, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam

FOR THE COURT:
RON GARVIN
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

APPENDIX D

[Mandate issued 8/8/94]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 91-1314

TEAMSTERS NATIONAL UNITED PARCEL SERVICE NEGOTIATING COMMITTEE AND INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL 385, AFL-CIO,
Petitioners/Cross-Respondents

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent/Cross-Petitioner

and Consolidated Case No. 91-1317

Petitions for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board

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BEFORE: Buckley, Ginsburg and Henderson, Circuit Judges

JUDGMENT

These causes came on to be heard on the petitions for review and cross-application for enforcement of an order of the National Labor Relations Board and were argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED, by the Court, that the petitions for review are denied and the cross-applications for enforcement are granted in accordance with the Opinion for the Court filed herein this date.

Per Curiam

FOR THE COURT:
RON GARVIN
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

Date: March 25, 1994

Opinion for the Court filed by Circuit Judge Ginsburg.

APPENDIX E

STATUTORY PROVISIONS

Section 8(a)(1)-(3) of the National Labor Relations Act (NLRA), 29 U.S.C. 158(a)(1)-(3), provide:

(a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective

date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

Sections 8(b)(1)(A) and (2), 29 U.S.C. 158(b)(1)(A) and (2) provide:

(b) Unfair labor practices by labor organization

It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; . . . .

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

APPENDIX F

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
TWELFTH REGION

Case 12-CA-12749

UNITED PARCEL SERVICE

and

SARA F. GRIFFIN, an individual

Case 12-CB-3028

TEAMSTERS NATIONAL UNITED PARCEL SERVICE NEGOTIATING COMMITTEE AND INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, LOCAL 385, AFL-CIO, its agent

and

SARA F. GRIFFIN, an individual

Cypress Room
Orlando Public Library
Orlando, Florida

Monday,
January 8, 1990

The above-entitled matter came on for hearing, pursuant to Notice, at 1:00 p.m.

BEFORE: HONORABLE WILLIAM N. CATES
Administrative Law Judge

* * * *

[22] ALFRED BARLOW

was called as a witness by and on behalf of General Counsel, and having been first duly sworn, was examined and testified as follows:

JUDGE CATES: Please have a seat. State your name and address for the record. Please spell your last name and speak with enough volume so each can hear what you have to say.

THE WITNESS: L. Barlow, B-a-r-l-o-w; 25 Louisiana, N.E., Washington, D.C. 20001.

JUDGE CATES: Mr. Barlow, I ask everyone to spell their last name and, hopefully, it will be correct, then, in the record.

General Counsel, you may question the witness.

DIRECT EXAMINATION

[23] Q. BY MR. MAIMAN: Sir, what is your title with the Teamsters?

A. I'm the director of the parcel small package division for the IBT.

* * * *

[28] Q. How many of the clerks—as you admitted, some were not covered; how many were not covered under the contract in 1979, total number?

A. I keep telling you, I don't know the figure; that it's my opinion, we had the majority. Whatever it is, we had the majority. I don't know the exact figure. I keep telling you, I don't know.

Q. More than 100 or 200? You're talking about 1,000 people here, at least, aren't we?

A. I can't give you a figure because I'd be speculating. But talking to Local Unions, hitting grievance panels, complaints coming in "Why don't we have them?", "Why aren't they an attrition?". Through the grievances filed with the national committee, I couldn't give you a figure, but I know—in my opinion, I think we had the majority.

* * * *

[53] Q. BY MR. MAIMAN: Isn't it true, that as of August 1, 1987, the effective date of the 1987 contract, you had no proof of majority status among the six new classes of clerks?

JUDGE CATES: That's not your last question. Your last question was, he said that he didn't feel—In response to that question, he answered, and I may be paraphrasing at this point that, no, your assumption wasn't correct, that they did believe that they had the majority. And then you asked him, "What's the basis for your belief, what is it that constitutes your belief that you had a majority?"; and he's now permitted to answer that question.

Go ahead.

THE WITNESS: I hit grievance panels; I talked to people; I had a workshop in San Diego, California. This is naturally a big topic of conversation for the warehouses. Talking to different people, talking to different Locals, talking to grievance panels, I assumed—I believe we had the majority status.

* * * *

[81] Q. BY MR. MAIMAN: Isn't it true, Mr. Barlow, that between 1979 and August 1, 1987, some package return clerks were not in the Union?

A. In some instances, in some Locals they were not, in others they were.

Q. Isn't it true, that with respect to bad address clerks—Between 1979 and August 1, 1987, isn't it true

that some of the bad address clerks were not in the Union in '79 to '87?

A. He's going to ask me six questions and the same thing on every one. Now, one takes care of the whole category, Your Honor.

JUDGE CATES: Are you saying that in all six of them, the response would be the same?

THE WITNESS: Sure, because we had some of them. We had, we figure, the majority of them.

MR. MAIMAN: No further questions.

* * * *

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
TWELFTH REGION

Case 12-CA-12749

UNITED PARCEL SERVICE

and

SARA F. GRIFFIN, an individual

Case 12-CB-3028

TEAMSTERS NATIONAL UNITED PARCEL SERVICE NEGOTIATING COMMITTEE AND INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, LOCAL 385, AFL-CIO, its agent

and

SARA F. GRIFFIN, an individual

Cypress Room
Orlando Public Library
Orlando, Florida

Tuesday,
January 9, 1990

The above-entitled matter came on for hearing, pursuant to Adjournment, at 9:30 a.m.

BEFORE: HONORABLE WILLIAM N. CATES
Administrative Law Judge

* * * *

[150] ROY MORTON

was called as a witness by and on behalf of the Company, and having been first duly sworn, was examined and testified as follows:

JUDGE CATES: Please have a seat. State your name and address for the record. Please spell your last name and speak with enough volume so each can hear what you have to say.

THE WITNESS: Roy Morton, M-o-r-t-o-n; 51 Weaver Street, Office Park Five, Greenwich, Connecticut 06813.

JUDGE CATES: You may question the witness.

DIRECT EXAMINATION

[151] Q. BY MR. WALD: Mr. Morton, you were first employed by UPS in 1959?

A. Correct.

* * * *

Q. In '69, you began working as a labor relations officer?

A. That's right.

Q. And you worked as the assistant regional labor manager for the mid-west region?

A. Correct.

* * * *

Q. Then you became regional labor manager for the western region in '69?

A. That's right.

* * * *

[152] Q. In '75, you moved to headquarters in Greenwich, on the headquarters labeled the national labor relations staff?

A. That's correct.

Q. And you've been there ever since?

A. Right.

* * * *

[158] Q. Okay. And what the Teamsters position in regard to the operating clerks?

A. Well, it hadn't changed. That since they represented the operating clerks in the majority of the areas with the majority of the Local Unions, that they should have the right to represent them in all of the areas with all Local Unions.

[159] Q. Did they also represent, as far as you know in numbers, the majority of the operating clerks?

A. Yes.

* * * *

[167] JUDGE CATES: Did you have an opinion whether Teamsters represented a majority of the operations clerks in 1987, I think is essentially what he was asking you?

THE WITNESS: Yes.

JUDGE CATES: Yes, you have an understanding?

THE WITNESS: Yes, it is my understanding that in 1987 the Teamsters represented the majority of the operating clerks in those classifications that were added to the labor agreement.

JUDGE CATES: What were you basing that on?

THE WITNESS: Based on my experience in working in the vast majority of the areas of the country.

JUDGE CATES: Did somebody tell you? I mean, how did you know that—

THE WITNESS: Well, we see—

JUDGE CATES: —this clerk was a member and that clerk wasn't?

THE WITNESS: We see operating reports in the business and we know which ones, which of the areas rep-

resent—which of the areas are represented by the Union and which of the areas are not represented by the Union. And of those areas that I was involved in the last—well, at that point in time, in the last 18 years, the vast majority of the operating clerks in the [168] classifications that were added in the 1987 agreement were in the bargaining unit.

JUDGE CATES: Already covered by Local agreements, is that what you're saying?

THE WITNESS: Yes.

* * * *

[220] VINCENT J. BOOS

was called as a witness by and on behalf of the Company, and having been first duly sworn, was examined and testified as follows:

JUDGE CATES: Please have a seat. State your name and address for the record. Please spell your last name and speak with enough volume so each can hear what you have to say.

THE WITNESS: My name is Vincent J. Boos, B-o-o-s. My address is United Parcel Service, Five Corporate Park, Greenwich, Connecticut 06831.

JUDGE CATES: You may question the witness.

DIRECT EXAMINATION

Q. BY MR. WALD: Mr. Boos, you started with UPS in 1964 as a package driver?

A. Yes, sir.

* * * *

[223] Q. Now you are a manager on the staff of the national labor relations department in Greenwich, which is headquarters?

A. That's correct.

* * * *

[239] Q. Okay. In the 1987 negotiation, based on your experience with the company and what you heard at the table, did you have an understanding as to whether a majority of the operating clerks were already in the Union or were not already in the Union?

A. Were in the Union.

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No. 94-539

In the Supreme Court of the United States

OCTOBER TERM, 1994

UNITED PARCEL SERVICE, INC., ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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16 pp

QUESTION PRESENTED

Whether the court of appeals correctly upheld the National Labor Relations Board's decision that employees who had historically been excluded from a collective bargaining unit could not be accreted to that unit without a showing of majority support for the union.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 17 F.3d 1518. The decision and order of the National Labor Relations Board (Pet. App. 14a-29a), together with the decision of the administrative law judge (Pet. App. 30a-51a), is reported at 312 N.L.R.B. 595.

JURISDICTION

The judgment of the court of appeals (Pet. App. 55a-56a) was entered on March 25, 1994. The petition for rehearing was denied on July 20, 1994. Pet. App. 54a. The petition for a writ of certiorari was filed on

September 23, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner United Parcel Service, Inc. (UPS) is engaged in the interstate transportation and distribution of parcels. Pet. App. 32a, 15a. The operations clerks, who are the subject of this dispute, process packages that UPS transports for delivery to customers. *Id.* at 37a, 15a n.3. Prior to 1979, approximately 220 locals of the International Brotherhood of Teamsters (Union) had individual bargaining relationships with various UPS facilities. *Id.* at 15a, 33a. Some of these bargaining units included operations clerks; others did not. *Id.* at 15a. Approximately 40% of the operations clerks were not covered by the local agreements. *Id.* at 16a.

In 1979, UPS recognized a single nationwide bargaining unit represented by the Union, into which the various separate geographical units were merged. UPS and the Union, representing the local unions, conducted national negotiations for a new collective-bargaining agreement. Pet. App. 16a, 33a.

The parties' first collective-bargaining agreement was effective from 1979 to 1982. Pet. App. 16a, 34a. That agreement covered various classifications of employees, including operations clerks "where already recognized." *Ibid.* Although the Union contended that the agreement should cover all operations clerks, in practice it covered only those employees who had been represented by the locals under the individual agreements. *Id.* at 16a, 35a. In 1982, over the objections of the Union, the parties entered into a new agreement. That agreement was initially effective until 1985 and was subsequently extended until 1987. The previously unrepresented operations clerks remained uncovered. *Id.* at 16a, 36a.

In 1987, UPS accepted the Union's proposal to include all operations clerks in the bargaining unit for a new agreement, to be effective August 1, 1987, through July 21, 1990. Pet. App. 36a. The duties of the operations clerks remained unchanged. *Id.* at 16a-17a. The 1987 agreement contained a union security clause requiring employees to pay union dues and initiation fees as a condition of employment. *Id.* at 16a, 37a. Some previously unrepresented operations clerks completed dues checkoff authorizations; UPS deducted the dues and fees, and transmitted the funds to the Union, which accepted them. *Id.* at 37a. The Union did not provide any evidence that it was supported by a majority of the previously excluded clerks, and UPS did not ask for any. *Id.* at 17a, 36a n.9.

2. a. In 1989 the General Counsel of the National Labor Relations Board (Board) issued a consolidated complaint and an amended complaint. The General Counsel alleged, *inter alia*, that UPS had violated Section 8(a)(1), (2), and (3) of the National Labor Relations Act (Act), 29 U.S.C. 158(a)(1), (2), and (3), by recognizing the Union as the collective bargaining representative of previously unrepresented operations clerks when a majority of those employees had not designated the Union as their representative, and by tendering to the Union dues deducted from the pay of these employees pursuant to the union security clause. The General Counsel also alleged that the Union had violated Section 8(b)(1)(A) and (2) of the Act, 29 U.S.C. 158(b)(1)(A) and (2), by receiving dues deducted from the pay of previously unrepresented operations clerks at a time when the Union did not represent a majority of those clerks and by causing UPS to discriminate against certain of them. Pet. App. 31a-32a.

After a hearing, an administrative law judge (ALJ) dismissed the complaint. Pet. App. 51a. The ALJ rejected the General Counsel's contention that because the operation clerks had been excluded from the unit under prior bargaining agreements, they could not be accreted to the existing unit in the absence of an election or showing of majority support. *Id.* at 41a, 44a-51a. The ALJ concluded that the clerks could lawfully be accreted to the existing unit because of their community of interest with the other clerks in that unit. In the ALJ's view, the clerks' prior exclusion from the unit did not bar accretion because the Union had not acquiesced in their exclusion. *Id.* at 46a-51a.

b. The Board reversed. Pet. App. 14a-29a. It concluded that UPS had violated the Act by recognizing the Union, and by deducting dues from the pay of the previously unrepresented employees and transmitting the money to the Union. It held as well that the Union had violated the Act by accepting recognition and accepting the dues. The Board explained that accretion to an existing bargaining unit is permitted only

> where *new groups of employees* have come into existence after a union's recognition or certification or during the term of a collective-bargaining agreement. If the new employees have such common interests with members of an existing bargaining unit that the new employees would, if present earlier, have been included in the unit * * *, the Board will permit accretion.

Id. at 18a (citing *Gould, Inc.*, 263 N.L.R.B. 442, 445 (1982)). Citing *Laconia Shoe Co.*, 215 N.L.R.B. 573, 576 (1974), the Board concluded that the previously unrepresented clerks could not lawfully be accreted to the existing unit because the parties had failed to include

that group of employees in the earlier collective bargaining agreements. Pet. App. 17a.[1]

The Board also disagreed with the ALJ's conclusion that accretion is foreclosed only when the union has acquiesced in employees' exclusion from the bargaining unit. "It is the fact of historical exclusion," the Board held, rather than the union's acquiescence, "that is determinative." Pet. App. 19a (emphasis omitted). The Board further found, however, that in any event the Union had acquiesced in the prior exclusion of the operations clerks. In successive bargaining agreements the group had been excluded, and during earlier negotiations the Union had consciously abandoned a proposal that would have included the disputed employees. *Id.* at 19a & n.5 (citing *King Radio Corp.*, 257 N.L.R.B. 521, 526 (1981)).

The Board further stated that UPS had acted unlawfully in recognizing the Union. It observed that "the Employer did not ask for and the Union did not proffer proof of majority support for the Union in the group of previously unrepresented employees. An official of the Union testified about his belief that the Union had majority support in this group, but he admitted that he had no 'papers,' including authorization cards, to support this belief." Pet. App. 17a.

To remedy the violations found, the Board ordered UPS to withdraw recognition from the Union as the representative of the employees in question, and to cease applying the terms of the 1987 agreement to those

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[1] In *Laconia Shoe Co.*, 215 N.L.R.B. 573, 576 (1974), the Board held that the primary consideration in accretion cases is "whether the group sought to be accreted has been in existence at the time of recognition or certification, yet not covered in an ensuing contract."

employees until the Union was certified by the Board as their representative. The Board also ordered the Union and UPS to reimburse the previously unrepresented clerks for dues and fees unlawfully exacted. Pet. App. 21a.

3. The court of appeals enforced the Board's order. Pet. App. 1a-13a. The court found that the Board had "properly applied its prior decisions to conclude that the unrepresented clerks employed by [UPS] could not lawfully be accreted to the existing bargaining unit without a showing of majority support among them for the Union and that the Union did not in fact enjoy majority support among them." *Id.* at 13a.

The court agreed with the Board that the decision in *Laconia Shoe* was controlling, and that the clerks' "historical exclusion * * * is determinative" when accretion is urged in the absence of a showing that the majority of the employees in question wish to be represented. Pet. App. 5a. The court also agreed that the Union's prior acquiescence in the clerks' exclusion was not relevant. *Id.* at 7a-9a. The court also noted that, even if acquiescence were a relevant factor, the Union here had "twice agreed" to the exclusion of those employees from the bargaining unit. *Id.* at 8a. Because the disputed employees could not be accreted to the unit, the court upheld the Board's conclusion that the Union could not represent the previously unrepresented clerks without a showing of majority support. *Id.* at 9a.

Finally, the court agreed that the General Counsel had met his burden of showing that the Union did not enjoy majority support among the disputed employees. In the court's view, "it is reasonable for the Board to presume that, absent some indication to the contrary, the majority of a group that has historically been excluded from a bargaining unit does not support the union that

represents that unit." Pet. App. 13a. Because UPS and the Union had "utterly failed" to rebut that presumption, the court stated, "the Board properly concluded that the Union lacked the necessary majority support." *Ibid.*

ARGUMENT

The court of appeals correctly applied established legal principles to the facts of this case. Its decision is not in conflict with decisions of this Court or of any other court of appeals. Further review is therefore not warranted.

1. It is well settled that an employer violates Section 8(a)(2) and (1) of the Act, 29 U.S.C. 158(a)(2) and (1), by recognizing, as the exclusive bargaining representative, a union that does not represent a majority of unit employees. *International Ladies' Garment Workers' Union* v. *NLRB (Bernhard-Altmann)*, 366 U.S. 731, 737-738 (1961). A union that lacks the support of a majority of the unit employees violates Section 8(b)(1)(A) of the Act, 29 U.S.C. 158(b)(1)(A), by accepting such recognition. Where an employer and a minority union enter into and enforce a contract containing a union security provision, the employer violates Section 8(a)(3) and (1), 29 U.S.C. 158(a)(3) and (1), and the union violates Section 8(b)(2) and (1)(A) of the Act, 29 U.S.C. 158(b)(2) and (1)(A).[2] *Local Lodge No. 1424, Int'l Assoc. of Machinists* v. *NLRB*, 362 U.S. 411, 412-414 (1960).

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[2] Section 8(a)(2) of the Act makes it an unfair labor practice for an employer "to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it." Section 8(a)(1) makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees" in the exercise of their Section 7 rights. Section 8(a)(3) makes it an unfair labor practice for an employer to enter into a union-security agreement with a union that does not

Before the Board and the court of appeals, petitioners contended that the operations clerks could be accreted to the existing bargaining unit, thus rendering unnecessary any direct inquiry into the level of support for the Union within that group of workers. In determining whether new employees may properly be accreted or added to an existing bargaining unit, the Board generally applies a community of interest test. That test involves an examination and balancing of such factors as "integration of operations, centralization of managerial and administrative control, geographic proximity, similarity of working conditions, skills and functions, common control of labor relations, collective-bargaining history, and interchange of employees." *Gould, Inc.*, 263 N.L.R.B. 442, 445 (1982). In the present case, however, the Board found the community of interest test inapposite. It instead applied the rule that "[w]hen a group [of employees] has in fact been excluded for a significant period of time from an existing * * * unit, the Board will not permit their accretion without an election or a showing of majority [support] among them." *Laconia Shoe Co.*, 215 N.L.R.B. 573, 576 (1974); see Pet. App. 18a-19a. Accord *King Radio Corp.*, 257 N.L.R.B. 521, 526 (1981); *Sterilon Corp.*, 147 N.L.R.B. 219, 221 (1964). The court of appeals correctly concluded that "the *Laconia Shoe* doctrine is critical to the protection of employees' Section 7 right to choose whether to

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represent a majority of the employees in the bargaining unit. Section 8(b)(1)(A) makes it an unfair labor practice for a union "to restrain or coerce employees in the exercise of the rights guaranteed in [S]ection 7." Section 7, 29 U.S.C. 157, protects "the right to self-organization, to form, join, or assist labor organizations, * * * and shall also have the right to refrain from any or all such activities."

belong to a union and if so to which one." Pet. App. 6a. As the Second Circuit explained in *NLRB* v. *Stevens Ford, Inc.*, 773 F.2d 468, 474 (1985), "[i]f groups of employees may be permissibly accreted to a bargaining unit after they have been earlier excluded from an election in that unit, strategic selection of one group for election purposes followed by accretion will lead to a larger bargaining unit in which the bargaining representative does not have majority status."

2. Contrary to petitioners' contention (Pet. 7-11), the court of appeals' decision is fully consistent with this Court's holding that a presumption must "rest on a sound factual connection between the proved and inferred facts," and that its validity depends upon the existence of a rational nexus between what is proved and what is inferred. *NLRB* v. *Baptist Hospital, Inc.*, 442 U.S. 773, 787 (1979). As the court of appeals explained, "[b]y showing that the disputed clerks had historically been excluded from the Teamsters Union, the General Counsel cast substantial doubt upon the Union's majority status among them." Pet. App. 12a. Because of this doubt, "which is founded upon fact and is thus 'more than conjecture,'" it is "reasonable for the Board to presume that, absent some indication to the contrary, the majority of a group that has historically been excluded from a bargaining unit does not support the union that represents that unit." *Id.* at 12a-13a.

NLRB v. *Curtin Matheson Scientific, Inc.*, 494 U.S. 775 (1990), is not to the contrary. In that case the Court upheld the Board's ruling that no presumption is warranted as to the union sentiments of replacement workers who crossed a picket line during a strike. The striker replacements in *Curtin Matheson* had voluntarily joined a bargaining unit represented by a union. Here, by contrast, UPS and the Union have long agreed

to exclude the employees in question from the benefits of representation. The Board's conclusion that these employees should be presumed not to support the Union is in no way inconsistent with its views concerning the likely preferences of striker replacements.

3. Similarly without merit is petitioners' related contention (Pet. 11-14) that the court of appeals' decision absolves the General Counsel of his burden to prove a lack of majority status. As the court of appeals pointed out, the General Counsel's burden of proof "should be sensitively calibrated * * * to the context in which it must be carried—in this case, a context formed by the doctrines of accretion and historical exclusion." Pet. App. 11a. Given the Board's "statement of the substantive law"—namely, that an accretion without an election or a showing of majority support among the disputed employees will not be permitted where they have been excluded for a significant period of time from an existing unit—the court correctly concluded that the General Counsel could not "be expected to prove more, in his prima facie case against accretion, than the fact that the employees in question were historically excluded from the putative bargaining unit." *Ibid.* While it was open to the Union to rebut the General Counsel's prima facie case by producing some reliable evidence of its majority status, it failed to do so.[3]

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[3] Prior to prosecuting the complaint in this case, the General Counsel subpoenaed all documentary evidence showing that the disputed clerks had designated the Union as their bargaining representative. The Union produced nothing in response. At the administrative hearing, a union official confirmed that he had "no records or papers to verify that." Pet. App. 11a. Instead, he testified that he believed that the Union had majority status solely on the basis of conversations he had had with some of the clerks in question.

4. Petitioners also contend (Pet. 14-16) that the court of appeals' decision subverts the operation of the Act by frustrating the goal of industrial peace. Under the statute, however, the preservation of employee free choice is of no less importance than is the encouragement of collective bargaining. *International Assoc. of Machinists* v. *NLRB*, 759 F.2d 1477, 1479 (9th Cir. 1985). As the Board explained (Pet. App. 18a), accretion is permitted only in limited circumstances because accretion denies employees the opportunity to select their bargaining representative.[4] The task of fashioning an appropriate balance between competing statutory policies is substantially entrusted to the Board, and the court of appeals correctly declined to disturb that balance.

5. Finally, there is no merit to petitioners' contention (Pet. 16-18) that the Board has departed from its established precedent without supplying a reasoned basis for that change. The court of appeals, after a careful analysis of the relevant precedents (Pet. App. 4a-9a), correctly concluded that the ruling here is fully consistent with the Board's prior decisions. There is, in particular, no basis for petitioners' contention (Pet. 17-

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Petitioners note (Pet. 11) that only one employee out of several thousand affected employees filed an unfair labor practice charge with the Board complaining about being accreted to the union-represented unit. However, the number of employees who choose to file a charge is not relevant to the determination whether the union enjoys majority support. Some employees may be reluctant to protest publicly a decision reached by a large employer and a large union; others may be content to let someone else act as their leader.

[4] The mere fact that the employer and the Union had reached an agreement to include the disputed employees (Pet. 14 n.2) cannot override the employees' Section 7 rights.

18) that *United States Steel Corp.*, 280 N.L.R.B. 837 (1986), is inconsistent with the decision in this case. *United States Steel* did not present the question whether employees that had historically been excluded from an existing bargaining unit should be accreted to that unit. See *id.* at 837 n.2. That situation is governed by the *Laconia Shoe* doctrine, and nothing in *United States Steel* indicates an intent to overrule that doctrine.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[5] Indeed, subsequent to *United States Steel*, the Board has continued to apply the *Laconia Shoe* doctrine in appropriate circumstances. See *Color Tech Corp.*, 286 N.L.R.B. 476, 487 (1987).